No. 86-1270

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1986

J. VINCENT APRILE, II and
WILLIAM M. RADIGAN - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

Petition for Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Kentucky may, consistent with due process, find an appointed public advocate attorney and his co-counsel, handling a mandatory death penalty appeal, guilty of criminal contempt and impose fines on a vote of 4-3 without making specific findings of fact and conclusions of law or specifying the elements of the offense and the standard of proof applied.

Petitioners contend that the Court should issue this writ to answer this question in the negative.

II. LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF KENTUCKY

In the Supreme Court of Kentucky, this action was styled *Brian Keith Moore* v. *Commonwealth of Kentucky,* No. 85-SC-101-I. Aprile and Radigan, Petitioners herein, were attorneys representing Appellant Moore in the appeal of his death sentence.

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SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1986

J. VINCENT APRILE, II and
WILLIAM M. RADIGAN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

V. OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is printed in Petitioners' Appendix A at Pages 1a-5a and has not been officially published. The order denying the motion to vacate is printed in Petitioner's Appendix B at Page 6a. The order denying the motion to reconsider is printed in Petitioner's Appendix C at Page 7a.

VI. JURISDICTION

The date of entry of the judgment sought to be reviewed is November 26, 1986. This Court has jurisdiction to hear the case under the provisions of 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and court rules which are set out verbatim:

Fourteenth Amendment to the Constitution of the United States § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Rules of Civil Procedure, Rule 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

> The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

Kentucky Rules of Criminal Procedure, Rule 9.26 (2):

> In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in it.

VIII. STATEMENT OF THE CASE

This case arises from J. Vincent Aprile and William M. Radigan's representation of Brian Keith Moore in the appeal of Moore's conviction of murder, kidnapping and robbery charges. For the murder offense, Moore was sentenced to death. Under Kentucky law, death sentences are subject to mandatory review (Kentucky Revised Statutes, Chapter 532). Timely notice of appeal was filed on December 6, 1984. Aprile, General Counsel for the Kentucky Department of Public Advocacy, was the attorney in charge of Moore's appeal. Radigan, an attorney in private practice, volunteered his services as Aprile's co-counsel.

Pursuant to an order of the Supreme Court of Kentucky July 11, 1985, Moore's brief was scheduled to be filed on or before August 12, 1985. On August 12, 1985, Moore, through counsel, filed a motion requesting an extension of time to and including June 12, 1986 in which to perfect the appeal and file his brief. By order entered on August 30, 1985, the Supreme Court of Kentucky granted Moore's extension. The court provided that if Moore's brief was not filed and his appeal perfected before June 12, 1986, Aprile and Radigan "shall appear before this Court on June 24, 1986, . . . in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief" (Appendix A, pp. 1a-5a).

On June 10, 1986, Moore, through counsel, filed a second motion requesting an additional six months to perfect the appeal and file his brief. Aprile and Radigan noted the length and complexity of the case, noting specifically that forty issues were presented in the motion for new trial. Additionally, Aprile explained that his time had been limited by unanticipated appointments to other criminal cases. By order entered June 25, 1986, the Supreme Court of Kentucky granted an extension of only three months to and including September 12, 1986.

On September 10, 1986, Petitioners filed a motion requesting an additional three months in which to perfect the appeal and file the brief on behalf of Moore. This motion requested the same amount of time orig-

inally requested in the June 10 motion. Petitioners cited the voluminous record in the case — the total transcript consists of thirty-six volumes comprising 4,781 pages — as one reason why they were unable to complete the brief within the time allotted. Further, Petitioners noted, the case involves over sixty issues to be presented for review in the appellate court. Aprile additionally cited his massive case load as a public advocate attorney.

By opinion and order entered September 25, 1986, the Supreme Court of Kentucky found Aprile and Radigan guilty of criminal contempt of court for failure to show why the brief was not timely filed pursuant to the Court's earlier order. This order was issued on a 4-3 finding of contempt by the Supreme Court of Kentucky. Chief Justice Stephens and Justices Leibson, Stephenson and Wintersheimer concurred in the finding of contempt. Justice Vance stated that he would impose sanctions, but without a finding of contempt. Justices Gant and White dissented (Appendix A, pp. 1a-5a).

On October 2, 1986, Petitioners filed a motion to vacate the court's opinion and order because one of the justices voting on the contempt charge had testified during the guilt-innocence phase of Moore's death penalty trial. The Supreme Court of Kentucky denied Petitioners' motion to vacate on November 6, 1986 (Appendix B, p. 6a).

On October 3, 1986, Petitioners filed a motion for reconsideration, asking the Supreme Court of Kentucky to reconsider its opinion and order because there was no adequate basis to sustain the convictions of criminal contempt. Petitioners argued that the order was fundamentally unfair and violative of due process because it failed to specify the elements of the offense, failed to make specific findings of facts and conclusions of law, and failed to specify the standard of proof. Further, Petitioners argued that the 4-3 finding of contempt did not satisfy the constitutional requirement of finding guilt beyond a reasonable doubt. The Supreme Court of Kentucky denied Petitioners' motion to reconsider on November 26, 1986 (Appendix C, p. 7a).

IX. ARGUMENT

In the case here presented, special circumstances exist which constitute important reasons for review on a writ of certiorari. Among those circumstances are the following:

I. The decision of the Supreme Court of Kentucky finding these attorneys in criminal contempt conflicts with the applicable decisions of this Court as enunciated in *Brown* v. *Louisiana*, 447 U. S. 323 (1980) and other cases.

II. This case presents constitutional questions of importance left open by *Evitts* v. *Lucey*, 469 U. S. 387 (1985).

The Supreme Court of Kentucky found Aprile, a public advocate attorney, and his volunteer co-counsel

guilty of criminal contempt and imposed fines for their failure to adequately show cause why their brief could not be filed within the time allotted by the court. Assuming that the proper standard of proof—beyond a reasonable doubt—was applied, a vote of 4-3 simply does not reflect the careful consideration necessary for a finding of criminal contempt.

Petitioners contend that the standard of proof beyond a reasonable doubt is not satisfied in this case because only four of the seven justices found that they were guilty of contempt. Justices Stephens, Leibson, Stephenson and Wintersheimer found that Petitioners were guilty of criminal contempt. Justice Vance believed that sanctions were warranted, but would not find the attorneys in contempt. Justices Gant and White dissented. The role of the Kentucky Supreme Court in this case is analogous to that of a jury acting as initial fact-finder in a criminal trial. It is true that unanimous verdicts are not constitutionally required in all state criminal trials. A 4-3 verdict, however, does not satisfy the requirement of a finding of guilt beyond a reasonable doubt.

In *Apodaca* v. *Oregon,* 406 U. S. 404 (1972) and *Johnson* v. *Louisiana,* 406 U. S. 356 (1972), this Court held that jury verdicts of 11-1, 10-2 and 9-3 were not automatically invalidated. In his *Johnson* concurrence, however, Justice Blackmun expressed the view that verdicts of less than a substantial majority might not withstand attack. Justice Blackmun stated: "I do not hesitate to say, either, that a system employing a

7-5 standard, rather than a 9-3 or a 75% minimum, would afford me great difficulty." *Johnson* v. *Louisiana,* 406 U. S. at 366. In *Burch* v. *Louisiana,* 441 U. S. 130 (1979), the Court joined in Justice Blackmun's concern about less than unanimous verdicts involving smaller numbers of jurors. In *Burch,* the Court held that conviction by a nonunanimous six-person jury in a state criminal trial violates the accused's right to trial by jury as guaranteed by the sixth and fourteenth amendments.

In *Brown* v. *Louisiana,* 447 U. S. 323 (1980), this Court cataloged the reasons for its earlier holdings on this issue. Several of the considerations cited apply in this case. First, "a decline in jury size leads to less accurate fact finding and a greater risk of convicting an innocent person." *Brown,* 447 U. S. at 333. Further, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defendant." *Id.*

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U. S. 307, 319 (1979). The bare majority vote of 4-3 by an appellate court serving as initial fact-finder on the question of an attorney's guilt on a contempt charge demonstrates a constitutional deficiency.

Criminal contempt is defined by Kentucky law as an act in disrespect of the court or its process which obstructs the administration of justice. *Casteel* v.

Sparks, 312 Ky. 99, 226 S. W. 2d 533 (1950). The standard applied in determining whether an attorney is in contempt is whether he is in reckless or willful disregard of a court order. *United States* v. *Delahanty,* 488 F. 2d 396 (6th Cir. 1973). The facts of this case do not suggest that these advocates were in reckless or willful disregard of the court's earlier order. The Supreme Court of Kentucky may properly be upset with the delays which took place in this case, but contempt of court is not the appropriate way to deal with these problems. A court should take great care before imposing that method of discipline, *Miller* v. *Stephenson,* 474 S. W. 2d 372 (Ky. 1971), in part because the impact upon the professional standing of a lawyer created by a citation for contempt of court is not limited to the monetary amount of the fine imposed.

The elements of the crime of contempt are not set forth in the court's opinion and order. Nor were Aprile and Radigan apprised before the time that they were found guilty of contempt what actions on their part would subject them to charges of contempt. Petitioners contend that their due process rights were violated because they were given no standards by which to attempt to conform their conduct. The court's earlier order granting their extension provided that if Aprile and Radigan did not file the brief and perfect the appeal within a certain time, they were to appear before the court "in order to show cause why they should not be held in contempt . . . or sanctioned, for failure to timely complete the brief." This lan-

guage represents the only guidance Petitioners were given with respect to the type of behavior which would lead to contempt charges.

Petitioners contend that the vagueness of this order, giving no standards by which to attempt to conform their conduct, violated their due process rights. Laws are frequently struck down for being overly vague:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibition is not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. *Rockford,* 408 U. S. 104, 108 (1972). *See also United States* v. *Harriss,* 347 U. S. 612 (1954). The rules as to vagueness also apply to orders of court. *McCreery* v. *Libby-Owens-Ford Glass Co.,* 363 Ill. 321, 2 N. E. 2d 290 (1936). Petitioners were given no indication what would constitute cause sufficient to prevent their being held in contempt if they were unable to file the brief in the time provided. This lack of standards violated the attorneys' due process rights.

The court's opinion and order includes no specific findings of fact or conclusions of law. This is a violation of the court's own rules and goes against the weight of authority holding that findings of fact and conclusions of law are essential in criminal contempt

cases. It was violative of Petitioners' due process rights for the Supreme Court of Kentucky to fail to specifically identify those acts which constituted criminally contemptuous conduct.

The Kentucky Rules of Civil Procedure require that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon. . . ." CR 52.01. This rule is mandatory and failure of a trial court to honor it may constitute reversible error. *Perry* v. *McLemore,* 414 S. W. 2d 141 (Ky. 1967); *Fleming* v. *Rife,* 328 S. W. 2d 151 (Ky. 1959); *Schaaf* v. *Brown,* 304 Ky. 466, 200 S. W. 2d 909 (1947). The Kentucky Rules of Criminal Procedure contain a similar provision. *See* RCr 9.26(2). The opinion and order in this case contains no such specific findings of facts. The failure of the Supreme Court of Kentucky to follow its own rules is fundamentally unfair and constitutes a due process violation.

Although the issue has not been specifically addressed in Kentucky, there is considerable authority in other jurisdictions that specific findings of fact are essential to support a judgment for contempt. *See, e.g., Fienup* v. *Rentto,* 4 S. D. 329, 52 N. W. 2d 486, 489 (1952) ("A disregard of this rule is not a mere irregularity in practice. It is a vital defect; the Court has no right to adjudge a party in contempt without making findings of facts showing as a matter of law, a basis for the judgment."); *Hildebrand* v. *Hildebrand,* 32 Wash. 2d 311, 201 P. 2d 213, 215 (1949) ("[F]indings of fact

must be made by the trial Court in either civil or criminal contempt cases.").

Furthermore, the Supreme Court of Kentucky did not identify the standard of proof applied in this case—whether the standard applied was beyond a reasonable doubt or clear and convincing or some other standard, is not made clear. The applicable standard of proof in criminal contempt cases is beyond a reasonable doubt. As this Court stated, "[w]ithout deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418 (1911). *See also Michaelson* v. *United States,* 266 U. S. 42 (1924); *Blackard* v. *State,* 217 Ark. 661, 232 S. W. 2d 977 (1950); *Brannon* v. *Commonwealth,* 162 Ky. 350, 172 S. W. 703 (1915).

Petitioner Aprile is a dedicated, experienced and effective public advocate. The records of this Court demonstrate that he has argued cases before this Court on four occasions, most recently on October 14, 1986. As a public advocate, he does not have the luxury of declining cases. The record before the Kentucky Supreme Court does not demonstrate any indication of laziness, procrastination or sloth on his part. Indeed, Petitioner Aprile works overtime hours for which he is not paid by reason of the budget restrictions. Petitioner Radigan is an attorney in private practice who volunteers his time in criminal appeals such as this one. He is not paid for his time in these cases.

In *Evitts* v. *Lucey,* 469 U. S. 387 (1985), this Court held that because due process guarantees that a criminal defendant receive effective assistance of counsel on his first appeal as of right, a mandatory appeal cannot be dismissed because counsel disobeys court rules. Justice Brennan suggested that "[t]o the extent that a state believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client." *Id.* at ——, 105 S. Ct. at 837. If, however, because of the fear of criminal contempt charges, counsel are forced to file briefs without adequate time to properly prepare them, a chilling effect upon the quality of legal representation may occur. Such a result is surely not what was intended by Justice Brennan's comment.

The real source of the problem is the burden of overload upon the public advocates and those, like Radigan, who volunteer their time and energy to indigents' cases. During the period of time involved in this case, Petitioner Aprile and another public advocate were under three additional show cause orders from the Supreme Court of Kentucky. Aprile and his co-worker were each able to comply with one order, but Aprile did not manage to comply in a third case. If sanctions are necessary, some method other than contempt of court should be adopted to draw the attention of practioners generally to the problems of extended delays in filing appellate briefs and in waiting until the last minute to

make motions for extensions of time. Petitioners, however, believe that due process requires that they be given prior notice that last minute motions will be considered contemptuous.

X. CONCLUSION

There is insufficient weight in a 4-3 decision to support a finding of guilt beyond a reasonable doubt. Further, it is fundamentally unfair and violative of due process to be subject to an order which does not specify the elements of the offense and the standard of proof applied or make specific findings of fact and conclusions of law. It is appropriate, therefore, that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Edmund P. Karem, Judge
79-CR-0976

OPINION AND ORDER

On August 30, 1985, this Court entered an order in the above-styled action granting appellant's motion for an extension of time to June 12, 1986, in which to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan, shall appear before this Court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief."

Appellant's counsel, J. Vincent Aprile, II, of the Department of Public Advocacy and William M. Radigan failed to comply with this Court's Order and a hearing was

held on June 24, 1986, at which time Mr. Aprile and Mr. Radigan appeared and testified.

We find the following facts to be true: The transcript of evidence was filed on July 10, 1985. Thereafter, *on the day the brief was due* appellant's counsel failed to file his brief but instead filed a motion for a ten (10) month extension. The reasons for the requested lengthy extension included a recitation of the length of the record on appeal and counsel Aprile's present caseload; along with counsels' estimate, after reviewing the record and based on their present caseloads and past experience with appeals of comparable nature and size, that an additional ten (10) months would be needed to prepare appellant's brief. In paragraph seven of the motion for extension counsel stated that "[b]ecause this is a capital case in which the death sentence was imposed, the undersigned counsel believed this initial extension of ten (10) months is both reasonable and necessary under the circumstances." On August 30, 1985, this Court considered and granted appellant's requested motion for extension of time and entered the aforementioned Order.

Ten months later, *one day prior to the date the brief was due,* appellant's counsel failed to file his brief but instead fined a motion requestisg a six (6) month extension of time. Counsel failed to comply with this Court's Order of August 30, 1985, to timely file appellant's brief and instead filed a second motion for extension of time which in large part recited the language of the previous motion for extension of time and listed "the length of the appellate record at bar, the number of preserved errors to be evaluated, and the imposition of the sentence of death" as reasons justifying counsel's request for an additional extension of time.

At the oral hearing conducted June 24, 1986, Mr. Radigan advised this Court that although he and Mr. Aprile

had served as appellant's trial counsel, neither he nor Mr. Aprile had completed reading the record in this case, nor begun writing appellant's brief. After eleven months and in spite of a pending show cause order, neither attorney had begun writing appellant's brief or had completed reading the record in the case. In a criminal case of this nature this Court will not dismiss an appeal for counsel's failure to timely file a statement of appeal and brief, but this Court cannot relinquish its authority by allowing counsel to decide when it is timely and appropriate for a brief to be filed, rather than following the orders of this Court.

Mr. Radigan and Mr. Aprile gave no adequate response to the Order of this Court to show cause. Both Mr. Radigan and Mr. Aprile served as trial counsel for appellant, however, after eleven months neither counsel has committed any portion of the appellant's brief to writing or read the record in its entirety. As appellant's trial counsel, both attorneys are thoroughly familiar with the record in this case and the issues of merit therein, and yet in the eleven months since the record was certified neither attorney has begun to work on the appeal, in clear violation of this Court's Order of August 30, 1985. While Mr. Aprile testified that his caseload as a public advocate prevented him from giving full attention to appellant's case, Mr. Radigan as a private attorney offered no excuse for his failure to begin work on appellant's brief. Upon accepting the responsibility of this appeal, Mr. Radigan agreed to devote the necessary time and energy to this case and as a private attorney who is able to control his caseload, he could not offer adequate reason for non-compliance with this Court's Order. Although counsel were fully aware that they would be unable to comply with this Court's Order of August 30, 1985 and timely file appellant's brief, they waited until the last day of the ten-month extension period

to request another extension. Counsel were granted a realistic deadline for filing appellant's brief. We cannot condone the practice prevalent in criminal cases of routinely seeking an additional extension of time on the last day of the extension period rather than filing the brief. When counsel is granted a lenthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief.

We find no acceptable excuse for counsels' failure to begin writing appellant's brief or even complete reading the record on appeal before the date the brief was ordered to be filed. We further find that Mr. Aprile and Mr. Radigan are in contempt of the Order of this Court entered August 30, 1985, requiring them to file appellant's brief on or before June 12, 1986, or appear to show cause why they should not be held in contempt of this Court or sanctioned for failure to timely complete the brief. We find Mr. Aprile's explanations as to caseload to be inadequate to explain his lack of effort to commit any portion of appellant's brief to writing or to read the record. We find Mr. Radigan's explanations to be even more inadequate as he is in private practice and is able to control his caseload so that he may honor his responsibilities. We find no explanation for counsel's failure to notify this Court immediately if legitimate considerations prevented their compliance with our Order of August 30, 1985, when notified thereof.

Being duly advised, it is the order of this Court that said J. Vincent Aprile, II, is found in contempt of court and fined $500 for his contempt. It is further the order of this

Court that said William Radigan is found in contempt of court and fined $500 for his contempt.

In consideration of this being the first conviction for Mr. Aprile, payment of his fine is suspended subject to further conduct. Mr. Aprile appeared before this Court on June 24, 1986 (the same day as the hearing in this case) to show cause why he should not be held in contempt or sanctioned for failing to file appellant's brief in Parramore Sanborn v. Commonwealth, but technically his appearances before this Court on June 24, 1986 in these two cases constitute his first convictions for contempt of Court.

On December 22, 1983, this Court entered an Opinion and Order styled In Re Radigan, Ky., 660 S. W. 2d 673 (1983) adjudging William Radigan to be in contempt of this Court and fining Mr. Radigan $100.00 for his failure to timely file the brief for appellant, Joseph Herald, and for his failure to timely notify this Court of his alleged inability to comply with court ordered briefing. As this present conviction is Mr. Radigan's second conviction for contempt of this Court, his $500 fine is payable to the Clerk of the Supreme Court.

Costs of this proceeding are assessed against Mr. Radigan and Mr. Aprile.

Stephens, C.J., Leibson, Stephenson, and Wintersheimer, J.J., concur. Vance, J., would impose the fine and costs as sanctions for failure to comply with a court order without a finding of contempt. Gant and White, J.J., dissent.

ENTERED September 25, 1986.

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
79-CR-0976
Honorable Edmund P. Karem, Judge

ORDER

The motion of appellant, Brian Keith Moore, by and with counsel to vacate this Court's Opinion and Order of September 25, 1986, is denied.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, J.J., sitting. All concur, Leibson, J., not sitting.

ENTERED: November 6, 1986.

(s) Robert F. Stephens
Chief Justice

APPENDIX C

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
No. 79-CR-0976
Honorable Edmund P. Karem, Judge

ORDER DENYING MOTIONS TO RECONSIDER OPINION AND ORDER HOLDING WILLIAM M. RADIGAN AND J. VINCENT APRILE IN CONTEMPT

The motions to reconsider opinion and order entered September 25, 1986, holding William M. Radigan and J. Vincent Aprile in contempt are denied.

Stephens, C.J., and Gant, Stephenson, and Wintersheimer, J.J., concur.

Leibson, J., not sitting.

ENTERED November 26, 1986.

/s/ Robert F. Stephens
Chief Justice

FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1270

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

J. VINCENT APRILE, II and
WILLIAM M. RADIGAN - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 86-1270

October Term, 1986

J. VINCENT APRILE, II and
WILLIAM M. RADIGAN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, Commonwealth of Kentucky, requests that the Court deny the petition for a writ of certiorari to review the Order of the Supreme Court of Kentucky entered in this proceeding on November 26, 1986, which order had denied reconsideration of an earlier Opinion and Order of the Supreme Court of Kentucky entered on September 25, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those constitutional provisions set forth by Petitioner, the following provisions of the Constitution of the Commonwealth of Kentucky are also involved.

Section 109 of the Kentucky Constitution provides, in part:

> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court.

Section 115 of the Kentucky Constitution provides, in part:

> Procedural rules shall provide for expeditious and inexpensive appeals.

Section 116 of the Kentucky Constitution provides, in part:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . .

COUNTERSTATEMENT OF THE CASE

While the factual account of the events in this controversy is mostly correct as supplied by Petitioners, there are some inaccuracies which must be corrected. Additionally, the Petition which has been filed herein contains, both in its Statement of the Case and in its Argument, factual assertions which are not supported by evidence in the record. For the purpose of clarifying events at the June 24, 1986, show cause hearing before the Supreme Court of Kentucky, a transcript of that hearing is provided in the appendix. (T.R. —) This hearing was necessitated by the Petitioners' failure to file a brief at the end of a ten month extension after the expiration of the original time for such filing. (The motion of Petitioners for an extension is in Appendix p. 18a; the order of the Supreme Court of Kentucky to make a timely filing or show cause is in Appendix, p. 26a. Despite having been under a show cause order should they fail to timely file their brief

during the ten months prior to June 12, 1986, Petitioners instead waited until the next to the last day of that period to move for a further extension rather than filing the brief. (The motion of Petitioners for an extension of time is set forth in Appendix, p. 27a; a colloquy between Petitioner Radigan and Chief Justice Stephens about Petitioners having waited until such late time to move for an extension appears at T.R. 12-13.)

At the show cause hearing, it was disclosed that Petitioner Radigan (criminal defendant Moore's trial counsel) had not read the record, eleven months after its certification. (T.R. 4) Written work on the brief had not begun as of that date.

After the hearing, the Kentucky Supreme Court granted an extension of three months in which to file Moore's appeal brief (The second motion of Petitioners for an extension of time is set forth in Appendix, p. 27a; the order of the Supreme Court of Kentucky to make a timely filing or show cause is set forth in Appendix, p. 36a). On motion of Petitioner Radigan, the second show cause hearing was rescheduled to accommodate counsel's two week vacation out of the country. Despite being under a second show cause order should they fail to timely file their brief prior to September 12, 1986, Petitioners *again* chose to wait until near the expiration of the extension to file a third motion to extend the briefing time. (The third motion of Petitioners for extension is set forth in Appendix, p. 39a; the order of the Supreme Court of

Kentucky to make a timely filing or show cause is set forth in Appendix, p. 52a).

Despite having been under a show cause order should they fail to file their brief at the end of the third extension, Petitioners chose to wait until very near the end of the extension to *again* move for an extension. (The fourth motion of Petitioners to extend is set forth in Appendix, p. 90a; the order of the Kentucky Supreme Court granting the motion is set forth in Appendix, p. 94a) After the *third* show cause hearing, nineteen months after the certification of record, rather than filing a brief, Petitioners again waited until the last day to file a *fifth* motion for extension. (Appendix, p. 94a; the order of the Kentucky Supreme Court granting extension is set forth in Appendix, p. 94a)

Finally, on February 2, 1987, Petitioners tendered their "brief", 282 pages in length and eighteen months after it was due. Petitioners have abused the judicial system consistently by ignoring show cause orders, making late filings of motions and failing to perform their duties to their client and the Supreme Court of Kentucky. The conduct of Petitioners has been deliberately calculated to make one point—they will file documents and comply with rules at their own pleasure and discretion. Their late filing of the Petition herein shows that they plan now to visit those tactics upon this Court.

SUMMARY OF ARGUMENT

I. *The petition for the writ should be denied because it was not timely filed.* Petitioners seek to have this Court review the judgment of the Supreme Court of Kentucky entered on November 26, 1986. Such petition is required by Rule 20.1 to be filed within sixty days of judgment. The sixtieth day was January 26, 1987. The record reflects the docketing of this petition on February 2, 1987, one week after the date upon which it was due.

II. *The petition for the writ should be denied as having been sought on frivolous grounds.* Petitioners have not sought the writ of certiorari to vindicate any constitutional rights but rather to subvert the ability of the Kentucky court system to control the flow of criminal appeals. Petitioners seek to obtain relief in this proceeding so that it can be combined with the holdings of this Court in *Evitts* v. *Lucey,* 469 U. S. 387 (1985) and the Sixth Circuit in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980). The net result of those two prior cases, if coupled with an outcome herein favorable to Petitioners, would be to leave the Supreme Court of Kentucky either unable to force the expeditious treatment of appeals on its docket or to embroil it in a controversy with the executive and legislative branches of state government.

III. *The holding of Petitioners in criminal contempt of the Supreme Court of Kentucky was not violative of due process and was an apropriate exercise*

of the criminal contempt powers of the court. Petitioners have undermined the Supreme Court of Kentucky's ability and duty to control the appellate processes of the state. For such actions, Petitioners were rightly held in contempt of court by the Supreme Court of Kentucky. In the finding of Petitioners in contempt, the Supreme Court of Kentucky followed constitutionally sound procedures for such proceedings before an appellate level court. Such sufficient procedures consisted of notice, opportunity to be heard and a result with findings and conclusions based upon evidence introduced into the record of such proceeding.

IV. *The decision of the Supreme Court of Kentucky to hold Petitioners in contempt was not violative of any rights to effective assistance of counsel.* The right to counsel argument of Petitioners should not be considered by the Court because it was not raised in the proceeding below and is not supported by evidence in the record. 28 U.S.C. 1257(3); *Crowell* v. *Randell,* 10 Pet. 368 (1936) Such argument should further be rejected because Petitioners lack standing. Even should the argument be considered properly raised, the argument is spurious because this Court has expressly indicated that application of sanctions against attorneys is an option to state courts in situations where sanctions could not be applied to the clients of said attorneys without violation of the constitutional right to effective assistance of counsel. *Evitts* v. *Lucey,* 469 U. S. 387 (1985)

REASONS FOR DENIAL OF THE WRIT

I. The Petition for the Writ Should be Denied Because It Was Not Timely Filed.

Petitioners seek review of a judgment of the Supreme Court of Kentucky entered in a criminal matter on November 26, 1986. The petition is required, by Rule 20.1, to be filed with the Clerk of this Court within sixty days of the entry of judgment by the Supreme Court of Kentucky. Pursuant to Rule 29.1, the sixty day time period would begin on November 27, 1986; it would have run out on January 25, 1987. That date being a Sunday, the petition was required to be filed on Monday, January 26, 1987. Despite that fact, the petition was not filed until February 2, one week after the filing deadline.

This Petition is not saved by the filing by mail provisions of Rule 28.2, because the petition was not in fact mailed to the United States Supreme Court as stated in the certificate of service. The petition was actually filed with the *Supreme Court of Kentucky* and counsel for Petitioners had no idea of the error until informed by counsel for Respondent, on a date *after* January 26, 1987. The certification of counsel for Petitioner as to a timely filing by mail is false. (See the affidavit of John R. Leathers, counsel for Respondent, Appendix, p. 1a)

The rules of this Court are clear. The Petition was not filed in a timely fashion, there has been no attempt to secure relief from this Court as to the failure to timely file and, for this reason alone, the Petition

should be denied. The attempt by Petitioners to file even this Petition in a time outside that set by the rules is the importation into this Court of exactly the tactics for which they were held in contempt—Petitioners think that *no rules* apply to them and that they can file anything they wish at any point in time which they choose.

II. The Petition for the Writ Should be Denied as Having Been Sought on Frivolous Grounds.

The Petition should be denied on the grounds demonstrated *infra* that the due process—contempt arguments of Petitioners are frivolous because they are inapplicable to the facts. Even more important is that Petitioners seek not to vindicate due process rights but rather to usurp the power of the Supreme Court of Kentucky to control the process of moving cases through the state's appellate courts. In Kentucky, power to make rules for such proceedings is vested in the Supreme Court of Kentucky. Ky. Const. Sec. 116. In appellate proceedings, the Supreme Court of Kentucky is *required* to provide rules which "provide for expeditious and inexpensive appeals." Ky. Const. Sec. 115. The Supreme Court of Kentucky has a duty to maintain its authority over such matters. This power has been held to be exclusively within the judicial power in Kentucky, excluding even interference by the Kentucky legislature. *Commonwealth* v. *Schumacher,* 566 S. W. 2d 762 (Ky. App., 1978) This Petition is *not* about due process but involves a power struggle over control of the process of appellate advocacy in

criminal cases. Always present in such death penalty cases is the fact that defense counsel bear philosophical opposition to the penalty and delay serves, if nothing else, to prevent the carrying out of the sentence.

The issue behind this case is effective assistance of counsel requirements for criminal appeals being handled by the Office of Public Advocacy. In Kentucky, the leading federal cases on point are *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980) and *Evitts* v. *Lucey,* 469 U. S. 387 (1985). In *Cleaver,* the Sixth Circuit upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed when his publicly supplied counsel was denied an extension of time in which to file a brief. The holding was based upon the Sixth Circuit's conclusion that the Sixth Amendment right to counsel was denied when such extension was denied to an attorney whose caseload made it impossible for him to file in a timely fashion. In *Evitts,* this Court upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed for failure of his counsel to file a statement of appeal as required by the procedures of Kentucky. In both cases, reliance was placed upon the right to counsel interpretations of *Anders* v. *California,* 386 U. S. 738 (1967) and *Douglas* v. *California,* 372 U. S. 353 (1963). Due to *Evitts* and *Cleaver,* the Supreme Court of Kentucky *cannot* deny such "motions" for an extension of time. Petitioners by their "motions" were telling the Supreme Court of Kentucky not that they *needed* an extension of time and that it should be granted, but that the Court *had* to give it to them.

Petitioners represented a convicted murderer and kidnaper. Brian Keith Moore was convicted of capital murder, first degree robbery and first degree kidnaping; he was given the death penalty. In June, 1985, the record in the case was certified. Following certification, Petitioners were given until August 12, 1985, in which to file their brief; they then received a ten month extension coupled with a show cause order if they did not file the brief by June 12, 1986. The due date for the appeal brief was thus eleven months after the record had been certified. Instead of filing their brief on June 12, Petitioners on that date filed a motion for another ten month extension. Given the holdings of the Sixth Circuit in *Cleaver* and of this Court in *Evitts,* the Supreme Court of Kentucky had no choice but to allow Petitioners to continue to delay the filing of the brief. The entry of any sanction against Moore himself would have been grounds for a grant of *habeas corpus.* If the entry of a sanction against Moore was the only option open to the Supreme Court of Kentucky, there simply would have been no procedural limit to when Petitioners would be required to file because such sanction would not in fact have been usable due to the effective assistance of counsel requirements of *Cleaver* and *Evitts.* The usage of a sanction against Moore would have been pointless since reversal of the Supreme Court of Kentucky would have been inevitable. The "motion" of Petitioners for an extension was not a motion at all—the Supreme Court of Kentucky had no choice but to grant it.

With this petition, Petitioners have "dropped the other shoe." The cloak of constitutional "questions" does not hide the substance of this ploy. With *Cleaver* and *Evitts* as their base, Petitioners ask this Court to hold that counsel cannot constitutionally be penalized for failure to file briefs in a timely fashion. With no sanction against their client, the result is to elevate the Office of Public Advocacy beyond the reach of time constraints. According to this argument, their client could not constitutionally be penalized for failure to file, Petitioners could not constitutionally be penalized for failure to file and, as if by magic, time constraints upon Petitioners disappear. Not only would time constraints disappear, but also the ability of the Supreme Court of Kentucky to regulate appeals, the actions of practitioners and the Supreme Court of Kentucky's own processes would similarly disappear. At stake in this case is whether time periods for filing appeals for criminals in the Kentucky courts will be controlled by the Supreme Court of Kentucky or by Petitioners and those similarly situated.

There is no reason that the issue is limited to time periods for filing briefs; similar tactics would seem effective in such matters as length of the appellate brief, length of time for oral argument and most other rules of procedure applicable to appeals. Usage of the tactic in related areas is demonstrated by the fact that, when Petitioners did finally choose to file a brief for their client, it was *282* pages in length. Such result is not unusual, the Supreme Court of Kentucky regularly receives from the office of Petitioners hundreds of

pages of briefing, most of which is not remotely applicable. Further, the guerrilla tactics being perfected by Petitioners may not be limited to the Kentucky court system or even to the other state courts in the United States. If Petitioners see fit to ignore this Court's five page limitation upon a reply (as they have already seen fit to ignore the filing deadline for their Petition), it is easy to envision the grounds upon which such "right" will be asserted. *This Court* may find itself, as did Kentucky Supreme Court, at the mercy of their tactics; if so, this Court's reaction will probably be no more tolerant than was that of the Kentucky Supreme Court.

Assuming that Petitioners seek an ability to set their own time for the filing of criminal appeal briefs, was there any other alternative open to the Kentucky Supreme Court than to hold them in contempt? In their Petition, Petitioners state that "The real source of the problem is the burden of overload upon the public advocates." (Petition, p. 13) In the past, Petitioners have both argued (in the prior contempt proceedings of each) that the Commonwealth has not budgeted adequate funds to the Department of Public Advocacy. Funding of the Office of Public Advocacy is a matter over which the Supreme Court of Kentucky has no control; funding is a political matter about which Petitioner Aprile is very knowledgeable given his frequent appearances before the Kentucky General Assembly as a lobbyist for his office. What is sought is either the help of the Supreme Court of Kentucky in securing that which Petitioners' could not secure

through the legislature or to visit the consequences of their lobbying failure upon clients and the courts.

Petitioners have placed themselves in a position where the Supreme Court of Kentucky was forced to choose among three alternatives: (1) to give up on taking any action against Petitioners, which action when combined with *Cleaver* and *Evitts* would leave the control of the Supreme Court's processes in the hands of Petitioners and their colleagues; (2) to embroil itself in the processes of the executive and legislative branches of Kentucky state government by *ordering* that additional funding be provided the Office of Public Advocacy; or (3) to hold Petitioners in contempt for having created the dilemma with which they confronted the Court. Abdication of control of the judicial process was unacceptable, not just for the Supreme Court of Kentucky, but for other state courts and for this Court as well. Neither was the second alternative appropriate in a state as firmly committed to the doctrine of separation of powers as Kentucky. *See, e.g., Ex Parte Auditor of Public Accounts,* 609 S. W. 2d 682 (Ky., 1980). Only the third alternative remained, absent a showing of any reasonable cause why briefing of the case had not even begun at the time of the show cause hearing. Petitioners put themselves into the position to force that choice, the choice came out the only way any reasonable appellate court would have chosen and Petitioners should not now be allowed to foist those unacceptable alternatives upon the Supreme Court of Kentucky through the help of this Court.

Petitioners persevere in this behavior. Petitioner Radigan has previously put himself in this situation, petitioned this Court for relief and failed. (*Radigan* v. *Supreme Court of Kentucky,* No. 83-1571) Petitioner Aprile has acted similarly, sought relief and failed. (*Aprile* v. *Commonwealth of Kentucky,* No. 86-852) Despite their prior experiences, Petitioners have learned nothing and persist. Apparently seeing themselves upon some crusade, they will continue their disruptive and abusive tactics until their punishment has reached a level sufficient to force them to conform their conduct to required procedures. Their continued conduct is deliberate and the punishment chosen for them has been appropriate for the level of their disruption.

III. The Holding of Petitioners in Criminal Contempt of the Supreme Court of Kentucky Was Not Violative of Due Process and Was an Appropriate Exercise of the Criminal Contempt Powers of the Court.

The ability of the Supreme Court of Kentucky, both under state and federal law, to punish for contempt is well settled.

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently, to the due administration of justice. *Ex Parte Robinson,* 86 U. S. 506, 509 (1874).

"And such is the recognized doctrine in reference to the powers of the courts of the several States". *Ex*

Parte Terry, 128 U. S. 298, 303 (1888). Similarly it is well settled in both state and federal practice that such power is activated by the issuance of a "rule" or a "show cause order". *Ex parte Robinson, supra,* utilized a show cause order in federal practice and the practice in Kentucky dates back at least to *In Re Woolley,* 74 Ky. 95 (1874), in which such procedure was utilized by the state's then highest court, the Court of Appeals. As Petitioners themselves note (Petition, p. 8) there is Kentucky authority for punishment of those who act in disrespect of the court or in obstruction of the administration of justice. *Casteel* v. *Sparks,* 312 Ky. 99, 226 S. W. 2d 533 (1950). Interestingly, Petitioners fail to note, in their citation to *Casteel,* the specific holding therein that such conduct includes *disobedience of orders,* the precise offense of which Petitioners are guilty. *Id.* at 536.

In review of this case, however, it is necessary to keep in mind one very crucial difference between the availability of contempt power in the federal system and the state system. Despite the fact that many federal cases speak of the authority to punish for contempt as being inherent in the federal courts, there has long been federal legislation applicable to that contempt power. *See,* 18 U.S.C. 401. This federal statutory dimension, which is criminal in nature, probably explains at least in part the long search by this Court for a meaningful distinction between civil and criminal contempt. In the state of Kentucky, there is no legislation which applies any such limits or re-

strictions upon the contempt power of the judiciary. As a result of this, many of the cases cited by Petitioners in support of the Petition simply have no applicability to the facts at hand. Often a federal case will apply a restrictive view of contempt, not because of any federal constitutional requirement but because of a federal statutory requirement. *See, e.g., In Re McConnell,* 370 U. S. 230 (1962). The effect of the dichotomy between federal statutory provisions and federal constitutional provisions will be that only those United States Supreme Court decisions reviewing state contempt proceedings and those federal decisions based on federal constitutional requirements are applicable herein.

In attacking the findings of the Kentucky Supreme Court that they were in contempt for failure to file a timely brief, Petitioners raise a multitude of arguments, some of which purport to be based on the requirement of Due Process and others of which lack any apparent federal constitutional basis. Whether taken individually or in the aggregate, the contentions of Petitioners are invalid and the Petition should be denied.

A. The Due Process Standards Advanced by Petitioners Are Inapplicable to a Contempt Proceeding Before an Appellate Court Such as the Supreme Court of Kentucky.

The Petitioners have advanced a number of bases on which it is alleged that their having been held in contempt by the Supreme Court of Kentucky was in violation of certain due process standards applicable

to state proceedings under the Fourteenth Amendment. Included among the alleged violations of due process were such disparate matters as the size of the vote by which they were held in contempt, an alleged failure to specify the elements of the offense, an alleged failure to specify the standards applicable to their conduct, an alleged failure to make findings of fact and conclusions of law and an alleged failure to apply the appropriate standard of proof in the case. While it certainly is true that due process is required in any state court proceeding, including the one below, Petitioners have made a fundamental error in concluding that the standards which they have advanced are the ones which governed the proceeding below. This error on their part comes from a failure to distinguish between a contempt proceeding before a trial court (with or without a jury) and a contempt proceeding before the highest appellate court of the jurisdiction—here the Supreme Court of Kentucky. The hodge-podge of arguments advanced by Petitioners relating to the technical aspects of the contempt finding are difficult to respond to because of such confusion. In this petty variety of contempt, it is difficult to envision how Petitioners think the contempt powers of the Supreme Court of Kentucky should be exercised. It would seem absurd for the highest court of the state to in effect charge itself as a trial judge would charge a jury and then to withdraw for consideration as would a jury of laymen. Common sense would indicate that

contempt in this appellate setting is fundamentally different than in the setting of trial courts.

This Court has previously considered the distinction between trial court contempt powers and appellate court contempt powers in *United States* v. *Barnett,* 376 U. S. 681 (1964), in which famous case Ross Barnett, then governor of Mississippi, was held in contempt by the United States Court of Appeals for the Fifth Circuit for disobedience to that court's order that James Meredith, be admitted as a student at the University of Mississippi. The Court held that a jury was not required in a proceeding to determine contempt regarding a Court of Appeals order, rejecting the argument of Governor Barnett that a jury trial was required by 18 U.S.C. 402, the Sixth Amendment or the due process clause of the Fifth Amendment. While the apparent conclusion of *Barnett* that there was no right to jury trial in contempt regardless of the punishment has been modified by *Bloom* v. *Illinois,* 391 U. S. 194 (1968) so that a serious contempt would activate jury trial protection, there has been and should be no retreat by this Court from the conclusion that an appellate setting is fundamentally different from a contempt proceeding in a trial court.

In the case at hand, the Supreme Court of Kentucky's usage of the contempt power can most fairly be analogized to the usage of a disciplinary power over a practitioner responsible to that court for his actions taken on behalf of his client. The Supreme Court of Kentucky is charged by Section 115 of the Kentucky

Constitution with the duty of providing rules for "expeditious and inexpensive appeals". In the case at hand an expeditious appeal could hardly have been said to be taking place where the one month briefing time (between certification of record in July, 1985, and the original due date in August, 1985) had already been extended for ten months and Petitioners sought still an additional ten month extension. As of the time of the filing of this reply to the Petition, appeal has been delayed for many months as Petitioners have only very recently tendered their brief. It should additionally be noted that, all the while that Petitioners have delayed the preparation of their brief, their client has languished in prison. While their position may be that he thereby escaped issuance of a death warrant, it is equally possible that their appeal might be successful and that some result culminating in his release might be obtained. It is not the function of Petitioners to dictate the outcome of a case by their own course of conduct—their duty to the Supreme Court of Kentucky and to their client was to file a competent, professional brief in a timely manner.

In the closely related area of attorney discipline, the Court has long required scrupulous obedience by its own practitioners to the orders of the Court. Despite this Court's conclusion that a disbarment proceeding is "quasi-criminal" (*In re Ruffalo,* 390 U. S. 544 [1968]), the Court's own rule provides for a summary procedure in which the burden is placed upon the attorney to show cause why he should not be disbarred. Rule 8;

In re Isserman, 345 U. S. 286 (1953), rev'd. 348 U. S. (1954). Although the current version of Rule 8 does not expressly so provide, it appears that such decisions are made simply upon a majority vote of the justices of this Court participating. *In re Isserman,* 348 U. S. 1 (1954); Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed., 1986), Section 19.8. The reported decisions of the Court seem to indicate that such disbarment decisions are made by the Court simply upon the written filings; if oral arguments do in fact take place in such proceedings, they appear to be rare. *See, e.g., In re Osborne,* 420 U. S. 918 (1975); *In re Buttles,* 419 U. S. 1101 (1975). The sanction imposed by the Supreme Court of Kentucky upon Petitioners (fines of $500, one suspended) falls well below the penalty of disbarment and was issued by procedures (including oral argument) which go far beyond those required by this Court for the policing of its own practitioners.

In the application of sanctions to its own practitioners, this Court utilizes show cause orders in the same fashion utilized by the Supreme Court of Kentucky. Rule 8. Such procedure has been used by this Court to issue a reprimand to an attorney for failure to pay a bill of the Court's clerk for costs. *In re Davis,* 289 U. S. 704 (1933). In such cases, the Court has noted the necessity of giving its "action a punitive quality to make the high obligation of the members of the bar to respect decisions of the Court". *In re Gilbert,* 276 U. S. 294 (1928). Obedience to its orders is every bit as important to the Supreme Court of Ken-

tucky as is obedience to the orders of this Court. The contempt finding against Petitioners was made by the Supreme Court of Kentucky under circumstances which would have similarly moved this Court, had the actions taken place here rather than in Kentucky, and such findings were made in a manner procedurally identical to those which the Court has used regarding its own practitioners. Such procedures are not violative of any standards of due process.

B. Petitioners' Due Process Rights Were Not Violated by the Failure of the Supreme Court of Kentucky to Make Findings of Fact and Conclusions of Law.

Petitioners contend that their due process rights were violated by the alleged failure of the Supreme Court of Kentucky in its September 25 order to make findings of fact and conclusions of law. As their basis for alleging such failure to be violative of due process, Petitioners point to provisions of the procedural rules applicable in Kentucky in civil cases (C.R. 52.01) and criminal cases (R.Cr. 9.26[2]). From this, Petitioners reason that "the failure of the Supreme Court of Kentucky to follow its own rules is fundamentally unfair and constitutes a violation of due process". (Petition, p. ...).

It cannot fairly be stated that the Supreme Court of Kentucky has failed to follow its own rules. Initially it should be noted that there exists no Kentucky authority for the proposition that the provisions of the Civil Rules or the Criminal Rules are even applicable to a contempt proceeding before the Supreme Court of

Kentucky. Assuming such to be the case, the September 25 order of the Court is in compliance with both rules because the opinion rendered there fairly states the findings of fact and conclusions of law, thus obviating the need for a separate document embodying the findings and conclusions. C.R. 52.01; R.Cr. 9.26(2).

Even if one would assume, however, that the September 25 order did not in fact comply with the requirements of the Kentucky procedural rules, Petitioners cite absolutely no authority for the proposition that such failure constitutes a violation of due process. The two cases of sister states cited by Petitioners contain no authority for such a proposition. In *Fienup* v. *Rentto,* 74 S. D. 329, 52 N.W. 2d 486 (1952) a South Dakota trial court's contempt finding was reversed for failure to make findings and conclusions as required by established state caselaw; there is not even a hint in the opinion that such findings were required by anyone's standard of due process—state or federal. Similarly in *Hildebrand* v. *Hildebrand,* 32 Wash. 2d 311, 201 P. 2d 213 (1949) a trial court was reversed for failure to make findings required by state law; no portion of the opinion even addresses any question of due process. It is further significant to note that both decisions involve contempt findings by trial courts; considerations applicable to trial courts are not directly applicable to proceedings before the highest court of the state.

Even if it were correct that the Supreme Court of Kentucky had failed to make findings and conclusions

required by state law, such failure could constitute grounds for review in this Court only if such failure rose to a level of impairment of some right protected by the United States Constitution. This Court is *not* simply an appellate court with the power to review all of the actions of the Supreme Court of Kentucky. Only those matters which are governed by federal law can here be reviewed. *Murdock* v. *Memphis,* 20 Wall. 590 (1875); 28 U.S.C. 1257(3). No such matter is presented by these facts. The September 25 order of the Supreme Court of Kentucky contains sufficient findings and conclusions; if it does not, such failure is solely a matter of state law which is outside the review authority of this Court.

C. Petitioners' Due Process Rights Were Not Violated by the Failure of the Supreme Court of Kentucky to Set Forth the Standard of Proof in the Contempt Proceeding Against Petitioners.

Petitioners contend that a violation of due process has occurred in their contempt citation by virtue of the fact that the Supreme Court of Kentucky did not identify what standard of proof was necessary for the finding of contempt. From that alleged failure and the nature of the 4-3 vote of the Supreme Court, Petitioners conclude that a finding of criminal contempt has been entered against them without proof of "guilt" beyond a reasonable doubt, as would be required in criminal cases.

Whatever may be the theoretical difference between criminal contempt and civil contempt, such distinction

is insignificant in Kentucky. In dealings with the special problems posed by contempt, Kentucky's highest court has observed that such proceedings are in a class by themselves, involving unique aspects and that attempts to apply ordinary rules of practice and procedure simply cause confusion. *Levisa Stone Corp.* v. *Hayes,* 429 S.W. 2d 413 (Ky., 1968). In the absence of a criminal statute analogous to 18 U.S.C. 401, there is no reason for the state to mirror the great importance placed in the federal system on the distinction between civil and criminal contempt.

Since 1972, Kentucky's judiciary has abandoned the attempt to maintain a practical distinction between civil and criminal contempts, noting that "the long and tortuous effort of the courts to classify contempts as civil or criminal has been a fruitless search for the impossible". *Miller* v. *Veitner,* 418 S.W. 2d 32, 34 (Ky., 1972). Rather than distinguishing between civil and criminal contempts, the Kentucky courts have noted that "[t]he important distinction to be drawn, it seems to us, is between those contempts for which a person cannot be jailed or fined without a jury trial and those for which he can". *Id.* at 35. Since it is clear that the punishments imposed on Petitioners here (a fine of $500 each, with that of Petitioner Aprile suspended due to this having been considered his first such offense) did not rise to the level necessary to require a jury trial under the holding of *Bloom* v. *Illinois,* 391 U. S. 194 (1968), it follows that the dis-

tinction between the types of contempt is of no importance under state law.

Both this argument and the argument of Petitioners concerning the size of the vote by which they were held in contempt raise a very difficult practical problem—how to structure such proceedings before an appellate court. If the punishment involved does not activate the right to trial by jury, how is the appellate court to proceed? It seems absurd to require the highest court to in effect "charge" itself as to a standard of proof as a trial judge would charge a jury. In fact, the proceeding is unique enough that it is not actually possible to draw any analogy from criminal trials proceeding at a trial level before a jury.

IV. The Decision of the Supreme Court of Kentucky to Hold Petitioners in Contempt Was Not Violative of Any Rights to Effective Assistance of Counsel.

Petitioners contend that the usage of the contempt power of the Supreme Court of Kentucky against them for their failure to file a timely brief in this matter constituted a violation of the effective assistance of counsel rights articulated by this Court in *Evitts* v. *Lucey, supra.* This is an argument which is spurious for a number of important reasons.

Of threshold importance is the lack in the record of a fundamental requirement relating to the effective assistance of counsel argument of Petitioners — the argument was not raised in the record. In neither their oral argument before the Supreme Court of Ken-

tucky nor their written argument in support of their motions for reconsideration did Petitioners raise the effective assistance of counsel argument which they now assert from *Evitts*. Petitioner Radigan argued that the contempt citation had a chilling effect upon his representation of *other* clients; neither he nor Petitioner Aprile argued that the contempt citation impeded their representation of Moore. The raising of such matter before the court below is a prerequisite to review authority in this Court. 28 U.S.C. 1257(3) Without such basis in the record, it cannot be said that such right has been "drawn in question" by the decision of the Supreme Court of Kentucky. This is a fundamental requirement, from which the Court has not deviated since Justice Story was on the Court. *Crowell* v. *Randell,* 10 Pet. 368 (1836). The requirement exists by act of Congress and by policy of this Court, based upon the fundamental principle of federalism that it is crucial that state courts be given the first opportunity to pass upon such federal arguments before they are called upon for review before this Court. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969).

In addition to effective assistance of counsel argument not being raised below, such argument is also inappropriate due to Petitioners' lack of standing. The basic notion of "standing" is that no person may litigate the legal rights of another. While standing is "determined by the specific circumstances of individual situations" [*U. S. ex rel Chapman* v. *F.P.C.,* 345 U. S. 153, 156 (1953)], the difficult standing cases commonly

involve questions of wide public interest. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Flast* v. *Cohen*, 392 U. S. 83 (1968). These great standing cases involved attempts by peripherally interested persons to litigate matters of public interest in which their lack of close factual connection ran afoul of the case and controversy requirements of Article III of the Constitution.

Petitioners lack standing to raise the issue of ineffective assistance of counsel. It is certain that the rights of Petitioners to effective assistance of counsel have not been violated in any way. If anyone would suffer from ineffective assistance of counsel, it would have been their client, Mr. Moore, who is not a party herein. There are no facts in the record below from which it could be concluded that the actions of the Supreme Court of Kentucky impaired in the slightest manner the Petitioners' representation of Mr. Moore. Neither in their Petition nor in any of the proceedings below did Petitioners point to the manner in which such right was factually impaired. The closest thing to a *fact* upon which to base such an argument is found in Petitioners' *assertion* that "a chilling effect upon the quality of legal representation may occur." (Petition, p. 13) Petitioners have only recently tendered a brief on behalf of Mr. Moore in the Supreme Court of Kentucky; certainly that fact alone (eight months after their show cause hearing) shows they have not been "stampeded" by the contempt finding into slipshod work on behalf of their client. Absent a factual basis

on which to judge the validity of such claim, it must be rejected by the Court.

Assuming that the contempt sanction of Petitioners did affect their representation of this client, such action by the Supreme Court of Kentucky still would not violate the effective assistance of counsel right. Anticipating that *Evitts* might impair the ability of states to enforce procedural rules, Justice Brennan outlined (among the "numerous courses remain(ing) open") that "a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client." *Evitts, supra,* p. 399. Petitioners seek this Court to reverse the Supreme Court of Kentucky for taking that course which the Court indicated was appropriate in *Evitts.* Without power to impose sanctions against practitioners, the Supreme Court of Kentucky will be left helpless and at the mercy of whatever conduct Petitioners believe is appropriate. Petitioners assert that actions such as that below have a "chilling effect" upon practitioners; in reality, it is the excesses of Petitioners which have had a negative effect upon appellate practice in Kentucky. The tactics of Petitioners have wrought chaos on the Kentucky appellate system and they seek license from this Court to continue and expand those tactics. They have "imported" that tactic to *this* Court, having chosen to file their Petition outside the time limit set by Supreme Court Rule. Petitioners have shown, for the rules of this Court, the same disrespect, disdain and disobedience shown the Supreme Court of Ken-

tucky. It was to punish such tactics that Petitioners were held in contempt by the Supreme Court of Kentucky.

The contempt citation to Petitioners was intended to send a message to Petitioners and to other practitioners who might engage in similar tactics. The message of the Supreme Court of Kentucky was that there is an end to the patience of the Court and that *all* appeals must be processed in accordance with its rules and orders. It was a message deliberately sent and it was necessary to the Supreme Court of Kentucky in view to the *Cleaver* and *Evitts* "no-choice" motions.

The federal controls in *Cleaver* and *Evitts* make it wasteful for the Kentucky courts to deny such motions and to dismiss the appeals of criminal defendants. The *only* control which this Court has left to the judiciary is to sanction attorneys who refuse to follow the briefing schedules which the Kentucky Supreme Court is required by state to impose and supervise.

Lawyers who practice before the Supreme Court of the United States have no doubt as to the punishment and the consequences for willful disobedience of its orders. The paucity of cases attests to the effectiveness of that certainty in controlling the processes of this Court. Even the President has shown obedience to its orders rather than risking disobedience. *Nixon* v. *United States,* 418 U. S. 683 (1974). *This Court* would not tolerate the tactics which Petitioners have practiced before the Supreme Court of Kentucky. If this Court denies to the Supreme Court of Kentucky power to punish Petitioners for contempt which they deliber-

ately have brought upon themselves, then *this Court* will be sending a message to the members of the Kentucky Bar and every other state bar. The message will be that in the defense of criminal defendants *there are no rules.* That message would be as applicable to federal proceedings as to state proceedings, and to trial proceedings as to appellate proceedings; there would be no limit to the power which Petitioners and others would assert. There should be no mistake about it. This attack upon the contempt power of the Supreme Court of Kentucky is a major attack upon the integrity of the judicial process by Petitioners and others similarly situated. They seek to bend the rules of the system to fit their own philosophical positions. This Court cannot leave the Supreme Court of Kentucky in such position of helplessness against attack.

CONCLUSION

For these reasons, the Court should deny the Petition for Writ of Certiorari, letting stand the decision of the Supreme Court of Kentucky holding Petitioners in contempt of court.

Respectfully submitted,

JOHN ROBERT LEATHERS
P. O. Box 22242
Lexington, Kentucky 40522
Telephone (606) 257-1485

Counsel of Record for Respondent
Commonwealth of Kentucky

APPENDIX

AFFIDAVIT

Affiant, John R. Leathers, after first being duly sworn, states as follows:

(1) My name is John R. Leathers, I am a member of the Bar of the Supreme Court of the United States, and I am counsel of record for the Commonwealth of Kentucky in the proceeding involving a petition for writ of certiorari in the case of *J. Vincent Aprile and William M. Radigan* v. *Commonwealth of Kentucky,* No. 86-1270.

(2) On January 27, 1987, I received a telephone call from Susan S. Clary, General Counsel to the Supreme Court of Kentucky indicating that forty copies of the petition for writ of certiorari in the above-designated case had been delivered to that Court.

(3) On January 29, 1987, I telephoned the Clerk of the United States Supreme Court to determine the docket number assigned to the above-designated case and was informed that no such petition had been received by the Clerk.

(4) Following my conversation with the Clerk of the United States Supreme Court on January 29, 1987, I telephoned the office of Wyatt, Tarrant & Combs (counsel of record for Petitioners in the above-designated petition) and informed Ms. Michelle Turner that it seemed the copies intended for the United States Supreme Court had erroneously been filed with the Supreme Court of Kentucky. Ms. Turner stated to me that a secretary must have made a mistake about where to file the petition and made arrangements to have the copies picked up from the Supreme Court of Kentucky.

(5) On the following Monday, February 2, 1987, the petition for writ of certiorari in the above-designated case was docketed by the Clerk of the United States Supreme Court.

(6) It is clear from the sequence of events and the comments of Ms. Turner that the petition in this case was not in fact mailed to the Supreme Court of the United States on January 21, 1987, as stated in the certificate of service which accompanied the petition.

All of which matters Affiant swears and affirms as true and correct to the best of his knowledge, information and belief. Further, Affiant sayeth not.

(s) John R. Leathers

STATE OF KENTUCKY
COUNTY OF FAYETTE

This is to certify that on this the 16th day of February, 1987, there personally appeared before me John R. Leathers, who after first by me being duly sworn, swore and affirmed that the foregoing statements are true and correct to the best of his knowledge, information and belief.

(s) Paul C. VanBooven
Notary Public, State at Large
Kentucky

My Comm. Expires 9-5-87

SUPREME COURT OF KENTUCKY

TRANSCRIPT OF PROCEEDINGS—Filed Oct. 13, 1986

June 24, 1986

Re: Brian Keith Moore v. Commonwealth of Kentucky
Honorable J. Vincent Aprile, II and
Honorable William M. Radigan

APPEARANCES:

Chief Justice Robert F. Stephens
Justice Roy N. Vance
Justice William M. Gant
Justice John D. White
Justice Charles M. Leibson
Justice Donald C. Wintersheimer
Justice James B. Stephenson

Robert E. McBeath
Court Administrator

Hon. William M. Radigan
Walker, Radigan & Zeller
Attorneys at Law
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202

Hon. J. Vincent Aprile, II
Attorney at Law
Assistant Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Pursuant to notice duly given, the above styled matter came on to be heard on Tuesday, June 24, 1986 at 11:00 A.M. at the Supreme Court, Courtroom, Second Floor, The Capitol, Frankfort, Kentucky.

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Chief Justice Stephens: The case to be argued at this hour is in the case of Brian Keith Moore versus Commonwealth, and this also deals with a show cause order which was issued by this Court on August 30, 1985 addressed to the Honorable Aprile and the Honorable William M. Radigan. So, what we will do is ask both of you that are going to testify to raise your right hand, and then we'll proceed as we did before.

Oath Administered to Messrs. Aprile and Radigan.

Mr. Radigan: Chief Justice, gentlemen of the Supreme Court. Since you have heard from Mr. Aprile for sometime, I thought we'd give you a break, and at least start with me today. I'm speaking from a slightly different perspective than either Mr. Aprile or Ms. Namkin, because I'm a private attorney now. I've been one for two and a half years. I was involved in the Brian Keith death penalty trial, which was in October and November of 1984. At that time I was a private attorney. At the present time, I found to my chagrin, I don't even have a contract with the Public Defender office to represent Mr. Moore on appeal. I don't know how much I'm going to be paid on this, if anything. The situation as far as I see it in regard to this case is that, as

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a private attorney, I've got an obligation to do a certain amount of pro bono work in which I absolutely am not going to be making any money. I'm losing money for my law firm. I have handled in the last ten months three circuit court trials for the Public Defender office in Jefferson County as a conflict attorney, amounting to some twelve days of trial work for which I have been paid, much to my chagrin, a total of $3.52 on hour. The situation, as far as I am concerned in regard to Mr. Moore's appeal, and the reason that I'm on it, and I'm not concerned that I don't

have a contract with Public Advocacy, is the fact that when the trial was over Mr. Moore asked me to represent him on appeal. He wanted my services on the appeal and I agreed to do so. The problem that I've had in regard to this case, and I have read about—and I will be very candid with the Court—I have not completed reading the transcript in the case. I've read about two-thirds of it. The problem that I have had in regard to representation on a death penalty case, is that I take my obligation as an attorney, as a member of this Bar, very, very seriously. I take it even more seriously when an individual who I represented at trial has been sentenced to death, in a case in which I have very

strong personal opinions on. I feel that Mr. Moore deserves the best possible representation on appeal. He deserves to have the record reviewed independently by counsel, both Mr. Aprile and myself, have Mr. Aprile and I sit down, discuss the issues, make an assessment of the issues, and in a death penalty case, as of course this Court is aware, there is a question as to raising even unpreserved errors.

Justice Stephenson: Well, now, you tried the case at the circuit court level, is that correct?

Mr. Radigan: That is correct, Your Honor.

Justice Stephenson: Why would it take you so long to read the transcript? You ought to be familiar with it.

Mr. Radigan: I am somewhat familiar with it absolutely. I—

Justice Stephenson: You ought to be thoroughly familiar with it. You would know what objections you made.

Mr. Radigan: I have a listing of the objections that were made. That's correct, Your Honor.

Justice Stephenson:

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Well, then, why would it take you any particular length of time to go through that transcript?

Mr. Radigan: Because, Your Honor, if I want to give Mr. Moore proper representation, I cannot just simply refer this Court, in the motion and grounds for a new trial, I cannot simply refer this Court to where I made an objection. I have to look at the entire record in the case, present this Court with the issues, both preserved and unpreserved, with the arguments made, how the arguments were made, what the rulings were, and then I have to complete the research in regard to it.

Justice Stephenson: I know, but you're familiar with it to begin with.

Mr. Radigan: I am indeed, Your Honor.

Justice Stephenson: Can't you see the difference between being—trying a case and being familiar with it, and only seeing it for the first time at the appellate level?

Mr. Radigan: Oh, it does make it much easier as far as being familiar with the case.

Justice Stephenson: And, yet you say you haven't read the transcript.

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Mr. Radigan: I have not completed it, no, Your Honor, I haven't. The fact of the matter is that, in Mr. Moore's case, there are an extremely large number of issues that were preserved for appellate review. There were an extremely large number of issues that needed to be presented to this Court in the briefs, and I feel he deserves to have a good representation.

Justice Gant: Well, we've all got that opinion.

Mr. Radigan: And,—

Justice Gant: That's no defense. As a private attorney—what, ten months was your original extension, isn't that correct?

Mr. Radigan: That was Mr. Aprile's and my assessment, yes, Your Honor.

Justice Gant: Aren't you able to control your practice to such an extent that you can give Mr. Moore the representation you're talking about?

Mr. Radigan: If I were—

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Justice Gant: Despite all your efforts of doing pro bono work and the twelve days you spent in trial of cases you made three dollars and odd cents an hour, and so forth, if you're going to acquit yourself to Mr. Moore and this Court has an order to you to have—not just to have read the record in the first ten months, but to have the briefs in, can't you control your practice to such an extent that you can get that work done? Were you under a show cause order from this Court in another case that you know of?

Mr. Radigan: No, Your Honor, not during that period of time.

Justice Gant: Thank you.

Mr. Radigan: The reason why I'd be unable to control totally my docket on that, if I were to give the Court an estimate right now, if I were to sit down and to estimate the number of hours that would be required for me to complete the record, including the time that I've already spent on it, and including the time necessary for researching and writing the portion of the brief that I feel I would probably be working on, I would estimate to the Court that

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I would have to take at least a month to six weeks off from my practice. I try and have tried to put time into that case. And, I've tried to put the emphasis that is necessary on Mr. Moore's case itself. I'm before this Court saying that after consultation with Mr. Aprile, we believe we can finish this case in six months and present the Court with the arguments and with the briefs in a completed form.

The question that I have is that if I were to have attempted to complete the pleadings that were necessary in this case, I would have had to have taken probably another month off from my work during the last ten months more than I've already taken off. And, quite frankly, I'm not sure if I would not have filed bankruptcy right now if I had done so. The fact is that Mr. Moore is in a situation that he requires representation of the highest degree possible, and I'm trying to do so.

Justice Leibson: Do I understand, counsel, that you are not being paid for this appeal?

Mr. Radigan: I found to my chagrin, Your Honor—

Justice Leibson: I heard you say that, but I don't know what that

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means. I'm asking you, does that mean you are getting paid, or you're not getting paid, or you don't know?

Mr. Radigan: I'm awfully hopeful that I will be paid. I have no agreement—

Justice Leibson: In other words, this is not pro bono, you expect to be paid, you just don't have a contract.

Mr. Radigan: I hope so. I don't have a contract, and there's no agreement as to how much I would—

Justice Leibson: May I ask you, sir, has anything yet been committed even to a first draft form where somebody could look at it?

Mr. Radigan: No, Your Honor.

Justice Leibson: No portion—nothing's been written on this case yet?

Mr. Radigan: No, Your Honor, except for my notes that I'm taking as I go through the transcript.

Justice Leibson: Well, I assume that you did prepare this case for

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trial in the first instance.

Mr. Radigan: That's correct.

Justice Leibson: And, I assume that you prepared on the law on the issues that would come up at the trial, did you not?

Mr. Radigan: To some of them, yes. There were obviously—

Justice Leibson: Well, at least as to those issues, I assume you're already prepared before—if you lost on the motions you're already prepared to write on those issues at the conclusion of that trial.

Mr. Radigan: No, Your Honor, that's not correct. We had a situation where we had, for instance—I'll give you one example. In February of 1984, we had about an eight hour suppression hearing in regard to a confession. A memo was filed at that time. However, I would be remiss to this Court and to Mr. Moore, if I didn't research materials in regard to that suppression issue—

Justice Leibson: Well, the memo isn't worthless, is it?

Mr. Radigan:

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Oh, no. It's a very good—I will hope the Court will think that it's a good basis for an argument.

Justice Leibson: I will assume, again, that we will get a great deal of the memo when the point is raised in this brief.

Mr. Radigan: But, for instance, there is a—

Justice Leibson: Is that true, or not?

Mr. Radigan: Oh, yes, Your Honor, I will be doing so, hopefully. But there has been significant changes in the law since then, both in this Court and in the Supreme Court of the United States in regard to the issue of suppression. I cannot, and I will not, take a memorandum of law, or an argument that I've made to a trial judge over two years ago, and utilize that solely in the presentation of

the brief to this Court. I think it would be remiss in my duty.

Chief Justice Stephens: Mr. Radigan, I had resolved to my brothers that I wasn't going to say anything, but I've just got to. I guess what—I understand all the principles that you have stated about the pro bono work, the concentration, and the private practice, but what troubles me is that when this initial extension

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was granted—ten months extension—surely at some—I'm not going to be guilty of hindsight judgments and say why didn't you know that it was going to take more than ten months, but what disturbs me is, why did you wait till the day before it expired, to file the motion. It just looks to me—you tell me where I'm wrong—it looks to me that you recognized that this Court, because of the death penalty case, was going to have to give you some kind of extension. Why didn't you, back in April, or surely you knew that you were going to fail to get it done, why didn't you do it in—because I feel the pressure, frankly, to grant some kind of an extension. I also feel some kind of upset and concern that you waited until the last day, as was done in the last case. And, that's what bothers me as much as anything about this whole matter, and I haven't heard that yet.

Mr. Radigan: Today, Your Honor, I have to apologize. Hindsight is a great teacher as far as that goes. Quite frankly, I had talked with Mr. Aprile as long ago as sometime in April in regard to the additional time that would be required to complete this. The decision to make—to file the extension motion late as it was, was, looking at it with the Court's

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understanding, an improper decision on our part, and to that, I simply can apologize, and that's all.

Justice Wintersheimer: You didn't recommend to Mr. Aprile that it be presented earlier?

Mr. Radigan: I talked to Mr. Aprile back at that time simply on the matter that we will require additional time, in my opinion, back at that time.

Justice Stephenson: One matter that was called to my attention, what do we do about these defendants going to federal court saying their rights are being violated by these long delays?

Mr. Radigan: I'm not aware, Your Honor—

Justice Stephenson: We have one situation like that already, haven't we?

Mr. Radigan: Not that I'm aware of, no, Your Honor. If that's the situation, then I'm not aware of that. I know that in representing my clients, I'm in telephone conversation with Mr. Moore once every week or two weeks, and I know in his instance, I've kept him

apprised of the status of his appeal, and I've talked to him about this extension motion, and he was in complete agreement as far as that goes.

Justice Stephenson: I assume he would agree to a ten year extension.

Mr. Radigan: Well, then, you know, as far as a client complaining and going into federal court about delay, again I'm not familiar with that situation, Justice Stephenson.

Justice Stephenson: I'm sure that has happened, and I'm sure it will happen more frequently now.

Mr. Radigan: If there is nothing else—

Justice Wintersheimer: Yes, how long have you been practicing? Mr. Aprile told us 13 years in his case. How long have you been practicing?

Mr. Radigan: Since 1975.

Chief Justice Stephens: Any other questions, gentlemen?

Mr. Aprile, do you want to say anything?

Mr. Aprile: If I may, Your Honor.

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Chief ustice Stephens: All right. I'm sorry.

Mr. Aprile: I feel a little bit differently in this second case and I feel a little bit more able to talk to you, I think. I'd like to say this, and if I'm out of turn, I hope you will indulge me, and if I'm out of turn, please correct me. I have done this job for 13 years. I have done Public Defender work because I wanted to do it. I have always thought there was something good about doing it, and I was very proud to do it, and try to do it well. I have practiced before this particular Court for 13 years when some of you weren't on it. I can truthfully say that I have never had from this Court, including this Body now, but others before you, a bit of praise for the work in opinion, whether I lost or not, a bit of praise for the quality and caliber of work that has been done. I'll say this. I have done cases in the United States Supreme Court, in the Sixth Circuit, I've done them in the military, and the Court of Military Appeals, and the Court—the Civilian—I'm sorry, the Court of Military Review. And, in every instance I can think of one or more times that I was told, you have done good work.

Justice Vance:

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Are you saying, then, that you're not going to comply with the Court order because we haven't praised you in the past?

Mr. Aprile: No, no, Your Honor. No, Your Honor, I'm not going to say that at all. What I'm saying is, what bothers me so much is not for me — I've been doing this a long time — I chose what I wanted to do. But what I'm really worried about, the more I thought sitting down here a few minutes ago when you talked about we should only have one attorney on a death penalty case, and the fact that Julie Namkin comes over here on her second death

penalty case and is before you, and she is very, very worried and upset about this, as I am — I'm not trying to say that — but, I've got a lot of time under my belt, and what I'm really afraid of — it's hard now for us to get good people to come and be public defenders, and to come in and represent people in these cases. Now, I don't know — I really and truthfully don't know — I respect this Court very much, but there's never been very much of a two way street as I have seen it in communications. I told you before, I had some fear about when to ask for an extension in this particular case, because I don't know what you're going to do. I don't have a right to know

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that. I understand that. But, all I'm saying is, don't worry about me. I am committed one way or the other, rightly or wrongly. But, please, if you believe we're doing something wrong in these cases, if you believe we're not really trying hard, because we want to do the right thing, we've got to live with the decision you make just like you do, and I don't understand it. I really am saying that I want this amount of time to devote so that when we finish with Brian Keith Moore's case, we will have put before you what we think is the best advocacy. Of course you won't agree with us on every point. You are the Judges and I know you make those decisions, but I have to sleep and understand and be able not to have nightmares at night. And, I'm telling you right now, I'm trying to do my job in this case and in the other cases, and I'm trying to do my job in the circuit court in Hopkinsville and there aren't a heck of a lot of people around who want to do this job. And, I think that it's totally unfair to look at Mr. Radigan and say, what is Mr. Radigan doing here, maybe he'll get paid, maybe he won't. We can't find people like Bill who are willing to take these death penalty cases on. If we could, we could contract more out, but we can't, and as a

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result, those of us in the office, and many in the office have more cases than I do that they're trying to balance. I don't know. I'm sure that what Your Honor said a moment ago about some of these people on death row are very glad for the amount of time that they are getting, but others, as I told you in the Parramore Sanborn case, he's concerned about the delay. It's not the same with every client. And, if you really think that what this is is bar faith on our part, that what I've come in here in both of these cases is to delay for some tactical reason, then, please, go ahead and do with me what you will, but all I'm trying to do is in the context of my job and trying to do a good job — which I know other courts have told me I do — that I'm trying to do the right thing. I'm not going to come in here five years from now asking for more extensions in a case. And, you all, you act like that's what we've done. The longest one that the Attorney General can show you is 20 months. You've kept cases — I'm not saying our cases — but, you've kept cases I'm sure — this Court — maybe not this Body — but you've kept cases for a long time because they were complicated and difficult, and some you get out earlier, and you have to balance your all's schedule. Surely, you understand that

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we're doing the same thing. I am not trying any kind of devious tactic in this case. I am not flaunting this Court's authority. Now, you can find differently from the evidence before you, but all I can say is, I try to do my job, and I hope you would appreciate that and recognize this is not a Court of Appeals brief, this is not a 20 and under case, or one of your small records. These are difficult cases. Bill Radigan and I spent a lot of time trying this case, and there were a lot of things, Justice Leibson, that happened in the course of that trial that we did not anticipate, and

those things we're still working on, trying to get the law together. You know if I file a brief in this Court, and I don't show you why the error wasn't harmless, I run the risk that you will tell me it's harmless. I run the risk even when I tell you that it's not harmless. I understand that. But, the point is, I have to cover all those bases. I didn't make the rules. I'm trying to live by them. But, I don't want to do it at the expense of the client. I'm sorry I have so many cases. I'm sorry that we're overloaded. I'm sorry that Bill Radigan can't be in a better situation that he can do this case within six months or ten months, but honest, all I can tell you is, we're trying to do

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the best we can. Nobody is over there cavalierly flaunting the Court. I don't like the fact that I have two of these death penalty cases running side by side. But what else can we do? There's nobody else to take them. I'm sorry. I probably have offended the Court, and I didn't mean to. But, this is a matter of heart, as well as a matter of law.

Justice Stephenson: We would expect that with any lawyer, Mr. Aprile. You're just a lawyer practicing at the Bar.

Mr. Aprile: That's true, Your Honor, that's all I am.

Justice Stephenson: You're supposed to do your best. I don't — I really can't see this suggestion that the Court's have to praise lawyers or criticize them. I try to do neither in an opinion.

Mr. Aprile: Your Honor, I didn't say that you have to do anything.

Justice Gant: Mr. Aprile, you can take it from this Court, that we appreciate you, your office, your staff. I don't think that publicly we've ever praised the Attorney General or you. I don't think privately

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we've probably ever praised the Attorney General or you.

Mr. Aprile: I hope you didn't misunder—mis—

Justice Gant: I understand your point. I think I did write one opinion in which I praised the OPA down in Louisville when one of their clients accused them of being a little slipshod, but other than that, I don't recall any public praise of anybody.

Mr. Aprile: I understand that is the style of this Court. All I'm saying—my point was not that. I don't mean to criti-

Justice Gant: Well, you're appreciated and — maybe not loved, but at least appreciated.

Mr. Aprile: I don't want to be loved. If you love us, then we're probably not doing our job. I understand that. I'm sorry if I have taken too much time. Are there any other questions?

Justice Gant: We understand.

Chief Justice Stephens: Any other questions?

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All right. Court is adjourned until tomorrow morning.

BEST AVAILA

STATE OF KENTUCKY
COUNTY OF FRANKLIN } SCT.

I, Juanita M. Toole, a Notary Public in and for the state and county aforesaid, do hereby certify that the foregoing testimony was transcribed under my direction; that the witnesses were duly sworn before giving their testimony; that the foregoing pages of typewritten matter constitute a true and correct copy of all testimony transcribed under my supervision.

I certify that the appearances are as listed on the first page of this transcript.

Witness my hand and notarial seal this 10th day of October, 1986.

My commission expires: February 17, 1990

(s) Juanita M. Toole
Notary Public
State of Kentucky at Large

BLE COPY

SUPREME COURT OF KENTUCKY

File No. 85-SC-101-I

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT

Comes now appellant, Brian Keith Moore, by counsel, pursuant to CR 6.02 and CR 76.40(1), and respectfully requests an extension of ten (10) months, from August 12, 1985 to and including Thursday, June 12, 1986, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 509.040), and one count of first degree robbery (KRS 515.020). For the murder offense, appellant was sentenced to death.

2. Final judgment was entered in the Jefferson Circuit Court on November 29, 1984 (Transcript of Record, Volume VIII, hereinafter designated T.R. (VIII), pp. 1183-1184). A timely notice of appeal was filed on December 6, 1984 (T.R. (IX), p. 1220). Copies of the judgment and notice of appeal are attached.

3. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by this Court.

4. On July 5, 1985 the record on appeal was completed and certified.

5. Pursuant to an order of this Court, entered July 11, 1985, the brief for appellant is due to be filed on or before August 12, 1985.

6. The transcript of record consists of nine (9) volumes and 1,223 pages. The transcript of evidence consists of thirty-one (31) volumes and 4,234 pages of actual proceedings. Additional volumes of evidence include: two (2) volumes of a suppression hearing consisting of 209 pages; one (1) volume of a pretrial motion hearing consisting of 57 pages; one (1) volume of a pretrial conference consisting of 199 pages; and one (1) volume of the sentencing hearing consisting of 82 pages. The total transcript of evidence is thirty-six (36) volumes and 4,781 pages.

7. The undersigned counsel have examined the record during the initial thirty-day briefing period and, based on their present caseloads and past experience with appeals of comparable nature and size, estimate that an additional ten (10) months will be needed to read the appellate record, to research the issues, to draft the brief for appellant, and to have it typed and reproduced. Of course, it is possible that, after additional work on this appeal, this estimate may be reversed either upward or downward. Because this is a capital case in which the death sentence was imposed, the undersigned counsel believe this initial extension request of ten (10) months is both reasonable and necessary under the circumstances.

8. Undersigned counsel J. Vincent Aprile, II, during the last thirty days, has filed a petition for rehearing and other pleadings in the Kentucky Court of Appeals as well as pleadings in this Court, the United States Court of Appeals for the Sixth Circuit, and federal district court. As General Counsel for the Department of Public Advocacy, undersigned counsel Aprile is required to spend a considerable amount of his work time on *unanticipated* requests for legal and ethical opinions generated by both local trial level

public advocates as well as members of the central staff of the Department of Public Advocacy. Additionally, undersigned counsel Aprile in his role as General Counsel to the Department of Public Advocacy has sole responsibility for representing the Department in litigation.

9. Both the undersigned counsel are compelled to commit a considerable quantity of time to numerous other clients, whose cases are also being procedurally and substantively processed within deadlines, and who are equally entitled to effective and timely representation.

10. This motion for an extension of ten (10) months is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

11. It should be noted that appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted an extension of ten (10) months to and including Thursday, June 12, 1986, in which to perfect the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile II
for William M. Radigan
Walker, Radigan and Zeller
Suite 303, Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202

(s) J. Vincent Aprile II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Please take notice that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 12th day of August, 1985.

(s) J. Vincent Aprile II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been hand delivered to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 12th day of August, 1985.

(s) J. Vincent Aprile II

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Jefferson Circuit Court
Honorable Edmund P. Karem, Judge
79-CR-0976

ORDER

Appellant's motion for an extension of time, to and including June 12, 1986, in which to file his brief and to perfect the appeal in the above-styled action is granted. If appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan, shall appear before this court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this court or sanctioned for failure to timely complete the brief.

Stephens, C.J., and Gant, Stephenson, Vance and Wintersheimer, J.J., sitting. All concur.

ENTERED August 30 1985.

(s) Robert F. Stephens
Chief Justice

File No. 85-SC-101-I

SUPREME COURT OF KENTUCKY

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT

Filed June 11, 1986

Comes now the appellant, Brian Keith Moore, by counsel, and pursuant to CR 6.02 and CR 76.40(1), respectfully requests an extension of six (6) months, from Thursday, June 12, 1986, to and including Friday, December 12, 1986, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 515.020). For the murder offense, appellant was sentenced to death.

2. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by this Court.

3. On July 5, 1985 the record on appeal was completed and certified.

4. Pursuant to an order of this Court, entered July 11, 1985, the brief for appellant was due to be filed on or before August 12, 1985.

5. On August 12, 1985, the undersigned counsel moved this Court for an initial extension of ten months from August 12, 1985 to and including June 12, 1986, in which to perfect this appeal and file the brief for appellant in the

above-captioned case. Based on their examination of the record during the initial thirty-day briefing period, the undersigned counsel "*estimate*[*d*] that an additional ten months [would] be needed to read the appellate record, to research the issues, to draft the brief for appellant, and to have it typed and reproduced" (Extension Motion, p. 2; emphasis added). The undersigned counsel qualified that estimate in their extension motion. "Of course, it is possible that, after additional work on this appeal, this estimate may be revised either upward or downward" (Extension Motion, p. 2).

6. On August 30, 1985 this Court entered an order granting appellant's motion for an extension of time, to and including June 12, 1986, in which to file his brief and to perfect the appeal (Order, 8-30-85). The order added that "[i]f appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel, Honorable J. Vincent Aprile II, the Honorable William M. Radigan, shall appear before this court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of court or sanctioned for failure to timely complete the brief" (Order, 8-30-85).

7. The transcript of record consists of nine (9) volumes and 1,223 pages. The transcript of evidence consists of thirty-one (31) volumes and 4,234 pages of actual trial proceedings. Additional volumes of evidence include: two (2) volumes of a suppression hearing consisting of 209 pages; one (1) volume of a pretrial motion hearing consisting of 57 pages; one (1) volume of a pretrial conference consisting of 199 pages; and one (1) volume of the sentencing hearing consisting of 82 pages. The total transcript of evidence is thirty-six (36) volumes and 4,781 pages.

8. The request by the undersigned counsel for an extension of another six (6) months is primarily based upon the length of the appellate record and the number of issues

presented. The motion and grounds for a new trial on the guilt phase contained twenty-six individual allegations of error (Transcript of Record, Volume VIII, hereinafter T.R. (VIII), pp. 1105-1131). The motion and grounds for a new trial on the sentencing phase contained fifteen (15) individual allegations of error (T.R. (VIII), pp. 1132-1149). There are forty (40) allegations of error in the post-trial motions alone. Additionally, appellate counsel in death penalty cases have an obligation to raise in an appellant's brief unpreserved arguably meritorious issues.

9. Due to the length of the appellate record at bar, the number of preserved errors to be evaluated, and the imposition of the sentence of death, the undersigned counsel believe this additional extension request of six (6) months is both reasonable and necessary. The United States Supreme Court has acknowledged that "delays . . . in the course of appellate proceedings" may be justified by "the need to assure careful review of an unusually complex case." *Harrison* v. *United States,* 392 U.S. 219, 88 S. Ct. 2008, 2009 n. 4, 20 L. Ed. 2d 1047 (1968).

10. Even if the undersigned counsel had been able to devote all of their time during the last ten months to the completion of appellant's brief, it would have been difficult, if possible at all, to complete the brief within the granted extension period. But as the undersigned counsel informed this Court in their initial extension motion, they both are required to represent other clients in the criminal justice system.

11. For example, on September 3, 1985, less than one month after the undersigned counsel filed appellant's initial extension motion, the record on appeal in *Charles Edward Johnson* v. *Commonwealth,* No. SC-292-MR, was received by the Clerk of this Court. Undersigned counsel Aprile on January 30, 1986 was placed under a show cause order if he failed to file the brief for the appellant in that case by

March 2, 1986. Undersigned counsel complied with that order and filed the brief in *Johnson* on March 3, 1986.

12. Additionally, in early April of this year undersigned counsel Aprile was required to substitute as trial counsel in a death penalty case which is pending trial in Christian Circuit Court. Substitution of counsel was necessitated by the resignation of the defendant's initial counsel from his position with the Department of Public Advocacy to join the staff of a Kentucky state prosecutor's office. Undersigned counsel Aprile's involvement in that case has absorbed a large portion of his time in the last two months. Of course, that assignment was not know to undersigned counsel Aprile in August, 1985.

13. Similarly, undersigned counsel Radigan is representing a client whose death penalty murder trial is scheduled to begin on July 28, 1986 in Jefferson Circuit Court.

14. This motion for an extension of six (6) months is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

15. It should be noted that appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted and extension of six (6) months to and including Friday, December 12, 1986, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile II
for William M. Radigan
Walker, Radigan and Zeller
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202

(s) J. Vincent Aprile II
J. Vincent Aprile II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Notice is hereby given that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 11th day of June, 1986.

(s) J. Vincent Aprile II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been hand delivered to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capital Building, Frankfort, Kentucky 40601, this 11th day of June, 1986.

(s) J. Vincent Aprile II

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Jefferson Circuit Court
Honorable Edmund P. Karem, Judge
79-CR-0976

ORDER

Appellant's motion for an extension of time is granted to the extent that appellant shall have until September 12, 1986, in which to file his brief and to perfect the appeal in the above-styled action. If the brief is not filed and the appeal is not perfected on or before September 12, 1986, counsel for the appellant, Honorable J. Vincent Aprile, II and Honorable William M. Radigan, Assistant Public Advocates, shall appear before this Court on September 16, 1986, at 1:00 p.m., to show cause why they should not be held in contempt of this Court or have sanctions levied against them for failure to timely file their brief and perfect the appeal.

All sitting. Stephens, C.J., and Leibson, Stephenson, Vance, White and Wintersheimer, J.J., concur.

ENTERED June 25, 1986.

(s) Robert F. Stephens
Chief Justice

MOTION TO RESCHEDULE SHOW CAUSE HEARING—Filed July 25, 1986

Comes now the undersigned counsel, William M. Radigan, and requests this Court to reschedule the Show Cause Hearing currently scheduled for September 16, 1986. As grounds for this Motion, the undersigned counsel Radigan states as follows:

1. In an Order entered on June 25, 1986, this Court granted the appellant an extension of time to and including September 12, 1986 in which to file the Brief for Appellant. In that same Order, this Court directed that, if the Brief is not filed on or before September 12, 1986, that a Show Cause Hearing shall be scheduled for September 16, 1986, at 1:00 p.m.

2. For some time now, the undersigned counsel Radigan has been scheduled to be out of the country from Saturday, September 13, 1986, through Friday, September 26, 1986. The undersigned counsel Radigan has already made reservations for that period of time.

3. In order to eliminate any possible future conflict in scheduling, the undersigned counsel wish to advise the Court of the following conflicts in their schedule: the undersigned counsel Aprile is unavailable due to scheduling conflicts from Monday, September 29, 1986 through Friday, October 3, 1986. The undersigned counsel Aprile is additionally unavailable due to scheduling conflicts from Monday, October 20, 1986, through Friday, October 24, 1986. The undersigned counsel Radigan is scheduled to begin a death penalty trial in the Jefferson Circuit Court on Tuesday, October 7, 1986, which is scheduled to last four days. Additionally, the undersigned counsel Radigan is scheduled to be in trial in the United States District Court for the Western District of Kentucky at Paducah on Thursday, October 16 through Friday, October 17, 1986.

WHEREFORE, the undersigned counsel request this Court to reschedule the Show Cause Hearing in the above-captioned case which is currently set for September 16, 1986, at 1:00 p.m.

Respectfully submitted,

(s) J. Vincent Aprile II
for William M. Radigan
Walker, Radigan & Zeller
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 569-2777

(s) J. Vincent Aprile II
J. Vincent Aprile II
Assistant Public Advocate
151 Elkhorn Court
Frankfort, Kentucky 40601

NOTICE

Notice is hereby given that the foregoing Motion was filed with the Clerk of this Court on this 25th day of July, 1986.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion was hand-delivered to the Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, on this 25th day of July, 1986.

(s) J. Vincent Aprile II

ORDER

On the motion of appellant's counsel, Honorable William M. Radigan, the show cause hearing scheduled in the above-styled action for September 16, 1986, is hereby rescheduled for October 7, 1986, at 11:00 a.m.

Leibson, Stephenson, Vance and White, J.J., sitting. All concur.

ENTERED August 28 1986.

(s) Robert F. Stephens
Chief Justice

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT

Filed September 10, 1986

Comes now the appellant, Brian Keith Moore, by counsel, and pursuant to CR 6.02 and CR 76.40(1), respectfully requests an extension of three (3) months, from September 23, 1986, to and including Friday, December 12, 1986, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020) one count of kidnapping (KRS 509.040), and one count of first degree robbery (KRS 515.020). For the murder offense, appellant was sentenced to death.

2. Final judgment was entered in the Jefferson Circuit Court on November 29, 1984 (Transcript of Record, Volume VIII, hereinafter designed TR 8, pp. 1183-1184). A timely notice of appeal was filed on December 6, 1984 (TR 9, p. 1220).

3. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by this Court.

4. On July 5, 1985 the record on appeal was completed and certified.

5. Pursuant to an order of this Court, entered July 11, 1985, the brief for appellant was scheduled to be filed on or before August 12, 1985.

6. An August 12, 1985, the appellant filed a Motion requesting an extension of time to and including June 12, 1985 in which to perfect the appeal and file the Brief for Appellant. This request was premised upon three factors: (1) the length of the record in the appellant's case; (2) the past experience of the undersigned counsel with appeals of comparable nature and size; and (3) the obligation of the undersigned counsel to other clients.

7. In an order entered on August 30, 1985, this Court granted the requested extension of time.

8. On June 10, 1986, the appellant filed a motion requesting an additional extension of time of six (6) months to perfect the appeal and file the Brief for Appellant. In so doing, the undersigned counsel noted the length and complexity of the case, as well as the large number (forty [40]) of issues presented in the Motion and Grounds for a New Trial. Additionally, the undersigned counsel explained that their available time had been limited by unanticipated *appointments* to criminal cases. For instance, the undersigned counsel Aprile had been forced, due to the resignation of an attorney in the Department of Public Advocacy, to substitute in April of 1986 in a pending death penalty case in the Christian Circuit Court. Similarly, the undersigned counsel Radigan had been appointed as a conflict attorney, to a murder case in the Jefferson Circuit Court.

9. In an Order entered on June 25, 1986, this Court granted the appellant an extension of only three (3) months, to and including September 12, 1986.

10. The transcript of record consists of nine (9) volumes and 1,223 pages. The transcript of evidence consists of thirty-one (31) volumes and 4,234 pages of actual trial

proceedings. Additional volumes of evidence include: two (2) volumes of a suppression hearing consisting of 209 pages; one (1) volume of a pretrial motion hearing consisting of 57 pages; one (1) volume of a pretrial conference consisting of 199 pages; and one (1) volume of the sentencing hearing consisting of 82 pages. The total transcript of evidence is thirty-six (36) volumes and 4,781 pages.

11. The undersigned counsel have completed reviewing the extensive record on appeal in the above-captioned case. As noted in the Motion of June 10, 1986, there were a total of forty (40) issues presented in the court below in the two Motions and Grounds for a New Trial (TR, Vol. 8, pp. 1105-1149). Additionally, through their review of the record in this case and after consultation with the appellant, the undersigned counsel have identified some twenty-two (22) additional issues, both preserved and unpreserved, to be presented to this Court for review.

12. A number of these issues have been researched and prepared. Additionally, the undersigned counsel have completed preliminary research on other issues. However, due to the amount of time which was required to review this record as well as commitments to other clients, the undersigned counsel have not had sufficient time to complete the Brief for Appellant by the scheduled date.

13. As noted in the Motion of June 10, 1986, undersigned counsel Aprile was substituted as trial defense counsel in a capital murder case in western Kentucky for another attorney in the Department of Public Advocacy who had resigned. During the past three months undersigned counsel Aprile has been forced to commit a substantial amount of time to investigation and pretrial motion practice in that Christian Circuit Court case. Furthermore, undersigned counsel Aprile has had to devote an extensive

amount of time to a post-conviction action in another capital case in eastern Kentucky.

During the prior extension period, undersigned counsel Aprile was required to devote a substantial period of time to the preparation of a brief on the merits in the United States Supreme Court. That case is scheduled to be argued next month. Additionally, undersigned counsel Aprile has filed during that same period appellate briefs in this Court and in the Kentucky Court of Appeals.

As General Counsel for the Department of Public Advocacy, undersigned counsel Aprile is required to spend a considerable amount of his work time on *unanticipated* requests for legal and ethical opinions generated by both local trial level public advocates as well as members of central staff of the Department of Public Advocacy. Additionally, undersigned counsel Aprile in his role as General Counsel to the Department of Public Advocacy has sole responsibility for representing the Department in litigation.

14. In additional to his private practice of law, the undersigned counsel Radigan was involved, as a conflict attorney for the Jefferson District Public Defender's Office in a four day murder trial in the Jefferson Circuit Court during July of 1986. Additionally, the undersigned counsel Radigan, again as a conflict attorney for the Jefferson District Public Defender's Office, has been appointed on a capital murder case in the Jefferson Circuit Court which is scheduled for trial on October 7, 1986. These cases by their very nature have required the devotion of an extensive amount of time.

15. It must be recalled that the United States Supreme Court has acknowledged that "delays . . . in the course of appellate proceedings" may be justified by "the need to assure careful review of an unusually complex case." *Harrison* v. *United States,* 392 U. S. 219, 88 S. Ct. 2008, 2009 n.4, 20 L. Ed. 2d 1047 (1968).

16. Both the undersigned counsel are compelled to commit a considerable quantity of time to numerous other clients, whose cases are also being procedurally and substantively processed within deadlines, and who are equally entitled to effective and timely representation.

17. This Motion for an extension of three (3) months is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

18. It should be noted that appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted and extension of three (3) months to and including Friday, December 12, 1986, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile II for
William M. Radigan
Walker, Radigan and Zeller
800 Republic Building
429 West Muhammad Ali. Blvd.
Louisville, Kentucky 40202

(s) J. Vincent Aprile II
J. Vincent Aprile II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Notice is hereby given that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky in the 10th day of September, 1986.

(s) J. Vincent Aprile II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been hand delivered to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 10th day of September, 1966.

(s) J. Vincent Aprile II

OPINION AND ORDER

On August 30, 1985, this Court entered an order in the above-styled action granting appellant's motion for an extension of time to June 12, 1986, in which to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan, shall appear before this Court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief."

Appellant's counsel, J. Vincent Aprile, II, of the Department of Public Advocacy and William M. Radigan failed to comply with this Court's Order and a hearing was held

on June 24, 1986, at which time Mr. Aprile and Mr. Radigan appeared and testified.

We find the following facts to be true: The transcript of evidence was filed on July 10, 1985. Thereafter, *on the day the brief was due* appellant's counsel failed to file his brief but instead filed a motion for a ten (10) month extension. The reasons for the requested lengthy extension included a recitation of the length of the record on appeal and counsel Aprile's present caseload; along with counsels' estimate, after reviewing the record and based on their present caseloads and past experience with appeals of comparable nature and size, that an additional ten (10) months would be needed to prepare appellant's brief. In paragraph seven of the motion for extension counsel stated that "(b)ecause this is a capital case in which the death sentence was imposed, the undersigned counsel believe this initial extension of ten (10) months is both reasonable and necessary under the circumstances." On August 30, 1985, this Court considered and granted appellant's requested motion for extension of time and entered the aforementioned Order.

Ten months later, *one day prior to the date the brief was due,* appellant's counsel failed to file his brief but instead filed a motion requesting a six (6) month extension of time. Counsel failed to comply with this Court's Order of August 30, 1985, to timely file appellant's brief and instead filed a second motion for extension of time which in large part recited the language of the previous motion for extension of time and listed "the length of the appellate record at bar, the number of preserved errors to be evaluated, and the imposition of the sentence of death" as reasons justifying counsel's request for an additional extension of time.

At the oral hearing conducted June 24, 1986, Mr. Radigan advised this Court that although he and Mr. Aprile had

served as appellant's trial counsel, neither he nor Mr. Aprile had completed reading the record in this case, nor begun writing appellant's brief. After eleven months and in spite of a pending show cause order, neither attorney had begun writing appellant's brief or had completed reading the record in the case. In a criminal case of this nature this Court will not dismiss an appeal for counsel's failure to timely file a statement of appeal and brief, but this Court cannot relinquish its authority by allowing counsel to decide when it is timely and appropriate for a brief to be filed, rather than following the orders of this Court.

Mr. Radigan and Mr. Aprile gave no adequate response to the Order of this Court to show cause. Both Mr. Radigan and Mr. Aprile served as trial counsel for appellant, however, after eleven months neither counsel has committed any portion of the appellant's brief to writing or read the record in its entirety. As appellant's trial counsel, both attorneys are thoroughly familiar with the record in this case and the issues of merit therein, and yet in the eleven months since the record was certified neither attorney has begun to work on the appeal, in clear violation of this Court's Order of August 30, 1985. While Mr. Aprile testified that his caseload as a public advocate prevented him from giving full attention to appellant's case, Mr. Radigan as a private attorney offered no excuse for his failure to begin work on appellant's brief. Upon accepting the responsibility of this appeal, Mr. Radigan agreed to devote the necessary time and energy to this case and as a private attorney who is able to control his caseload, he could not offer adequate reason for non-compliance with this Court's Order. Although counsel were fully aware that they would be unable to comply with this Court's Order of August 30, 1985 and timely file appellant's brief, they waited until the last day of the ten-month extension period to request another extension. Counsel were granted a realistic dead-

line for filing appellant's brief. We cannot condone the practice prevalent in criminal cases of routinely seeking an additional extension of time on the last day of the extension period rather than filing the brief. When counsel is granted a lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief.

We find no acceptable excuse for counsels' failure to begin writing appellant's brief or even complete reading the record on appeal before the date the brief was ordered to be filed. We further find that Mr. Aprile and Mr. Radigan are in contempt of the Order of this Court entered August 30, 1985, requiring them to file appellant's brief on or before June 12, 1986, or appear to show cause why they should not be held in contempt of this Court or sanctioned for failure to timely complete the brief. We find Mr. Aprile's explanations as to caseload to be inadequate to explain his lack of effort to commit any portion of appellant's brief to writing or to read the record. We find Mr. Radigan's explanations to be even more inadequate as he is in private practice and is able to control his caseload so that he may honor his responsibilities. We find no explanation for counsel's failure to notify this Court immediately if legitimate considerations prevented their compliance with our Order of August 30, 1985, when notified thereof.

Being duly advised, it is the order of this Court that said J. Vincent Aprile, II, is found in contempt of court and fined $500 for his contempt. It is further the order of this Court that said William Radigan is found in contempt of court and fined $500 for his contempt.

In consideration of this being the first conviction for Mr. Aprile, payment of his fine is suspended subject to further conduct. Mr. Aprile appeared before this Court on June 24, 1986 (the same day as the hearing in this case) to show cause why he should not be held in contempt or sanctioned for failing to file appellant's brief in Parramore Sanborn v. Commonwealth, but technically his appearances before this Court on June 24, 1986 in these two cases constitute his first convictions for contempt of Court.

On December 22, 1983, this Court entered an Opinion and Order styled In Re Radigan, Ky., 660 S. W. 2d 673 (1983) adjudging William Radigan to be in contempt of this Court and finding Mr. Radigan $100 for his failure to timely file the brief for appellant, Joseph Herald, and for his failure to timely notify this Court of his alleged inability to comply with court ordered briefing. As this present conviction is Mr. Radigan's second conviction for contempt of this Court, his $500 fine is payable to the Clerk of the Supreme Court.

Costs of this proceeding are assessed against Mr. Radigan and Mr. Aprile.

Stephens, C. J., Leibson, Stephenson, and Wintersheimer, J.J., concur. Vance, J., would impose the fine and costs as sanctions for failure to comply with a court order without finding of contempt. Gant and White, J.J., dissent.

ENTERED September 25, 1986.

(s) Robert F. Stephens
Chief Justice

MOTION TO DISQUALIFY AND RECUSE JUSTICE LEIBSON FROM ANY AND ALL PROCEEDINGS IN THE INSTANT CASE AND TO VACATE THIS COURT'S OPINION AND ORDER OF SEPTEMBER 25, 1986

Comes now appellant, Brian Keith Moore, by and with counsel, and moves this Court, pursuant to KRS 26A.015 (2)(b), SCR 4.300, Canon 3(C)(1)(b), and the Due Process Clause of the Federal Constitution, to disqualify and recuse Justice Charles Morris Leibson from any and all proceedings in the above-captioned case and to vacate this Court's Opinion and Order of September 25, 1986 in the above-captioned case. The reasons for this Motion are delineated below.

1. On September 25, 1986 this Court entered an Opinion and Order in the above-captioned case which "found" the undersigned counsel "in contempt of court and fined [each] $500.00 for his contempt" (Opinion and Order [9-25-86], p. 5). Four justices of this Court concurred in that opinion—Chief Justice Stephens, as well as Justice Leibson, Stephenson and Wintersheimer (Opinion and Order [9-25-86], p. 6.)

2. On October 29, 1984, Charles Morris Leibson, who was then and is still a Justice of this Court, testified during the guilt-innocence phase of Brian Keith Moore's death penalty trial below which is the subject of this appeal as a witness for the defense (Transcript of Evidence, Volume XXIV, hereinafter designated T.E. (24), pp. 3197-3236).

3. In Kentucky "[a]ny justice or judge of the Court of Justice . . . *shall disqualify himself* in any proceeding: (a) [w]here . . . the judge . . . *has been a material witness* concerning the matter in controversy . . ." KRS 26A.015(2)(b); (emphasis added). Similarly, SCR 4.300, the Code of Judicial Conduct in Canon 3(C)(1)(b), directs that "[a] judge should disqualify himself in a proceeding in which

his impartiality might reasonably be questioned, including but not limited to instances where . . . the judge . . . has been a material witness concerning it . . ."

4. It is clear under both Kentucky statutory law and procedural rule that Justice Leibson was required to disqualify himself from sitting on any proceeding arising out of the above-captioned case. Nevertheless, Justice Leibson concurred in the Opinion and Order entered on September 25, 1986 in violation of both statutory law and procedural rule. The Opinion and Order speaks for itself as to Justice Leibson's participation. "Appellate court opinions and orders . . . shall be reduced to writing and, except for unanimous actions of the Supreme Court, shall list the names of the members concurring or dissenting and indicate the names of any member who *did not participate* in the decision." CR 76.28(1); (emphasis added).

5. Justice Leibson's participation in the Opinion and Order in the above-captioned case violated the Due Process Clause of the Fourteenth Amendment as to appellant, Brian Keith Moore, and the undersigned counsel. *Aetna Life Insurance Co.* v. *Lavoie,* 106 S. Ct. 1580 (1986). "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." ' " *Aetna Life Ins. Co.* v. *Lavoie, supra* at 1587, quoting *In Re: Murchison,* 349 U. S. 133, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

6. "The final disposition of all appeals and original actions in the Supreme Court . . . *shall be decided* by a concurrence of at least four of its members . . . "SCR 1.020 (1)(a); (emphasis added). Assuming *arguendo* that Justice Leibson is disqualified pursuant to KRS 26A.015(2)(b) and SCR 4.300, Canon 3(C)(1)(b), then only three justices of this Court concur in a finding of contempt. That number

is not sufficient to render a finding of contempt of court in view of the prohibition contained in SCR 1.020(1)(a).

7. As in *Aetna Life Insurance Co.* v. *Lavoie, supra,* the decisive vote in the above-captioned case, holding the undersigned counsel in contempt, was that of the disqualified judge. The United States Supreme Court concluded that "the 'appearance of justice' will be best served by vacating the decision and remanding for further proceedings." *Id.,* at 1589.

WHEREFORE this Court should order that Justice Leibson is disqualified and recused from any and all proceedings in the above-captioned case as required by KRS 26A.015(2)(b) and SCR 4.300, Canon 3(C)(1)(b), and that this Court's Opinion and Order of September 25, 1986 be vacated.

Respectfully submitted,

(s) J. Vincent Aprile II by order
J. Vincent Aprile, II
Assistant Public Advocate
Department of Public Advocacy
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Frankfort, Kentucky 40601

(s) William M. Radigan
William M. Radigan
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(502) 569-2777
Counsel for Appellant

NOTICE

Notice is hereby given that the foregoing motion will be mailed to the Office of the Clerk of the Supreme Court of Kentucky on the 2nd day of October, 1986 to be filed upon receipt.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed, U. S. Postage prepaid, to the Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of October, 1986.

(s) William M. Radigan

ORDER

Appellant's motion for an extension of time, to and including December 12, 1986, in which to file his brief and to perfect the appeal in the above-styled action is passed to the show-cause hearing before this court scheduled for 11:00 a.m., on October 7, 1986.

Vance, White, Wintersheimer and Gant, J.J., sitting. All concur.

ENTERED October 6, 1986.

(s) Robert F. Stephens
Chief Justice

MOTION FOR RECONSIDERATION

Filed October 6, 1986

This Motion for Reconsideration of this Court's Opinion and Order entered September 25, 1986, is filed by J. Vincent Aprile, II, pursuant to CR 76.38. In its Opinion and Order, the Court found the Movant in contempt of court for failure to show cause why the brief in this action was not timely filed pursuant to the Court's earlier Order.

We move this Court to reconsider and modify its Opinion and order because there is no adequate basis to sustain a conviction of criminal contempt. The essential guarantee of due process is that of unfairness. It is fundamentally unfair to be subject to an Order which does not specify the elements of the offense and the standard of proof applied or make specific findings of fact and conclusions of law. It is further fundamentally unfair for the Court to violate its own rules. Movant's due process rights are violated by the Court's September 25, 1986 Order and the Order should be reconsidered and modified.

ARGUMENT

As we understand the Opinion and Order, the Court found Mr. Aprile, a Public Advocate attorney, guilty of criminal contempt, which is defined as an act in disrespect of the Court or its process which obstructs the administration of justice. *Casteel* v. *Sparks,* Ky., 226 S. W. 2d 533 (1950). The standard to be applied in determining whether an attorney is in contempt is to determine whether he or she is in reckless or willful disregard of the Courts order. *United States* v. *Delahanty,* 488 F. 2d 396 (6th Cir. 1973). The facts of this case do not suggest that this Public Advocate was in reckless or willful disregard of the Court's earlier order. The Court may properly be upset with the delays which took place in this case, but contempt of Court

is not the appropriate way to deal with these problems. The impact upon the professional standing of a lawyer created by a citation for contempt of Court is not limited to the monetary amount of the fine imposed. The Court should take great care before imposing that method of discipline. *Miller* v. *Stephenson,* Ky., 374 S.W. 2d 372 (1971).

The elements of the crime of contempt are not set forth in the Court's Opinion and Order. Nor was Movant apprised before the time that he was found guilty of contempt what actions on his part would subject him to a charge of contempt. Movant contends that this is a violation of due process because he was given no standard by which to attempt to conform his conduct. The Court's Order of June 12, 1986, granting appellant Moore's extension to file his brief and perfect the appeal provided that if Movant did not file Moore's brief and perfect his appeal on or before June 12, 1986, Movant was to appear before the Court on June 24, 1986 "in order to show cause why he should not be held in contempt . . . or sanctioned, for failure to timely complete the brief." This language represents the only guidance Movant was given with respect to the type of behavior which would lead to a contempt charge.

The U.S. Supreme Court stated the reason why an overly vague statute violates due process as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibition is not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Gragned v. *City of Rockford,* 408 U. S. 104, 108 (1972). *See also U. S.* v. *Harriss,* 347 U. S. 612 (1954). The rules as to vagueness also apply to orders of court. *McCreery* v. *Libby-Owens-Ford Glass Co.,* 363 Ill. 321, 2 N.E. 2d 290 (1936).

Movant was given no indication what would constitute cause sufficient to prevent his being held in contempt if he were unable to file the brief in the time provided. Clearly, this lack of standards violated Movant's due process rights.

The Court's Opinion and Order includes no specific findings of fact or conclusions of law. This is a violation of the Court's own rules and goes against the weight of authority holding that findings of fact and conclusions of law are essential in criminal contempt cases. It is a violation of Movant's due process rights for the Court to fail in its Order to specifically identify those acts of Movant which constituted criminally contemptuous conduct.

The Rules of Civil Procedure require that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specifically and state separately its conclusions of law thereon. . . ." CR 52.01. This rule is mandatory and failure of a trial Court to honor it may constitute reversible error. *Perry* v. *McLemore,* Ky., 414 S. W. 2d 141 (1967); *Fleming* v. *Rife,* Ky., 328 S. W. 2d 151 (1959); *Schaaf* v. *Brown,* 304 Ky. 466, 200 S. W. 2d 909 (1947). The Rules of Criminal Procedure contain a similar provision. *See* RCr 9.26(2). The Opinion and Order contains no such specific findings of facts. Failure to follow the Court's own rules is fundamentally unfair and constitutes a due process violation.

Although the issue has not been specifically addressed in Kentucky, there is considerable authority in other jurisdictions that specific findings of fact are essential to support a judgment for contempt. *See e.g., Fienup* v. *Rentto,*

74 S.D. 329, 52 N.W. 2d 486, 489 (1952) ("A disregard of this rule is not a mere irregularity in practice. It is a vital defect; the Court has no right to adjudge a party in contempt without making findings of facts showing as a matter of law, a basis for the judgment"); *Hildebrand* v. *Hildebrand,* 32 Wash. 2d 311, 201 P. 2d 213, 215 (1949) ("[F]indings of fact must be made by the trial Court in either civil or criminal contempt cases.").

Furthermore, the standard of proof applied by the court in this case, whether it is beyond a reasonable doubt or clear and convincing or some other standard, is not made clear. The applicable standard of proof in a criminal contempt case is beyond a reasonable doubt. "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418 (1911). *See also Michaelson* v. *U. S.,* 266 U. S. 42 (1924); *Blackard* v. *State,* 217 Ark. 661, 232 S.W. 2d 977 (1950); *Brannon* v. *Commonwealth,* 162 Ky. 350, 172 S.W. 703 (1915).

Further, Movant contends that the standard of proof beyond a reasonable doubt is not satisfied in this case because only four of the seven justices found that he was guilty of contempt. Justices Stephens, Leibson, Stephenson and Wintersheimer found that Movant was guilty of contempt. Justice Vance believed that sanctions were warranted, but without a finding of contempt. Justices Gant and White dissented.

While it is true that unanimous verdicts are not constitutionally required in state criminal trials, a 4-3 verdict does not satisfy the requirement of a finding of guilt beyond a reasonable doubt. In *Apodaca* v. *Oregon,* 406 U. S. 404 (1972) and *Johnson* v. *Louisiana,* 406 U. S. 356 (1972),

the Supreme Court held that jury verdicts of 11-1 and 10-2 were not automatically invalidated. In his *Johnson* concurrence, however, Justice Blackmun expressed the view that verdicts of less than a substantial majority would possibly not withstand attack. Justice Blackmun stated: "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or a 75% minimum, would afford me great difficulty." *Johnson,* 406 U.S. at 366. The 4-3 decision in this case simply cannot be said to demonstrate a finding beyond a reasonable doubt that Movant was guilty of criminal contempt.

CONCLUSION

For the foregoing reasons, we move this Court to reconsider and modify its Opinion and Order. We urge that the Opinion and Order be redirected to the real source of the problem, the burden of overload upon Public Advocates. If sanctions are necessary, the Court should adopt methods other than contempt of Court in order to draw to the attention of practitioners generally the problems of extended delays in filing appellate briefs and in waiting until the last minute to make motions for additional time. Movant believes due process requires that he be given prior notice that last minute motions of time will be considered contemptuous and that requests for extension of time similar to those which have been granted in other cases for the very same reasons, will also be considered contemptuous. The failure to make the contemptuous nature of such practice clear prior to imposing contempt violations is improper.

It is fundamentally unfair and violative of due process to be subject to an order which does not specify the elements of the offense and the standard of proof applied or make specific findings of fact and conclusions of law.

Further, there is simply not enough weight in a 4-3 decision to support a finding of guilt beyond a reasonable doubt. In all events, however, the contempt citations against this particular Movant should be withdrawn and the Opinion and Order appropriately modified.

Respectfully submitted,

(s) Robert C. Ewald
Robert C. Ewald
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Movant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was mailed, first class, postage prepaid, this 3rd day of October, 1986, to David L. Armstrong, Attorney General, State Capital Frankfort, Kentucky 40601 and to David A. Smith, Assistant Attorney General, State Capitol, Frankfort, Kentucky 40601.

(s) Robert C. Ewald
Counsel for Movant

MOTION TO RECONSIDER OPINION AND ORDER HOLDING WILLIAM M. RADIGAN IN CONTEMPT OF COURT—Filed October 6, 1986

Comes now William Radigan, pro se and by counsel, and moves this Court, pursuant to CR 76.38(2), to reconsider its Opinion and Order rendered in the above-captioned action on September 25, 1986 which found William M. Radigan in contempt of court and fined him $500 for his contempt. The reasons for this motion are delineated below.

ARGUMENTS

I.

This Court Denied William M. Radigan Due Process of Law Under the Fourteenth Amendment to the Federal Constitution by Failing to Observe Minimal Presumptions of Law as Well as Standards and Burdens of Proof in Adjudicating William M. Radigan in Contempt of Court.

On August 30, 1985 this Court entered an order granting the appellant in the above-captioned case an extension of time to and including June 12, 1986, to file appellant's brief and perfect the appeal. The order of August 30, 1985, also directed that, "[i]f appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel . . . shall appear before this Court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned for failure to timely complete the brief" (Order, 8-30-85).

It is quite apparent from the wording of the Court's order that the purpose of including the requirement of a "show cause" hearing was to "compel obedience to and respect for an order of court." *See Young* v. *Knight,* Ky., 329 S.W. 2d 195, 200 (1959). Thus, this Court communicated to William M. Radigan only that the Court would seek to punish him by holding him in contempt if he did not "timely complete" the appellant's brief in the *Moore* case. Such an order put Mr. Radigan on notice that he faced a show cause hearing limited to the question of civil, not criminal contempt. *Young* v. *Knight, supra; Hardin* v. *Summit,* Ky., 627 S.W. 2d 580, 582 (1982).

The Opinion and Order of September 25, 1986, is totally devoid of any language which indicates that this Court

gave Mr. Radigan the benefit of any legal presumptions—such as the presumptions of innocence or the presumption of compliance—or placed the burden of proof on this Court rather than on the alleged contemnor, Mr. Radigan. Finally, it is clear from a perusal of the Opinion and Order in question that this Court did not assess the proof by an accepted, articulated standard of proof such as "proof beyond a reasonable doubt" or proof by "clear and convincing evidence."

CIVIL OR CRIMINAL CONTEMPT?

In the instant case, this Court's order of August 30, 1985, appeared to be drafted in terms of civil contempt, but the sanction of a $500 fine clearly made the entire proceeding one of criminal contempt.

"It is not the fact of punishment but rather its character and purpose that often serve to distinguish civil from criminal contempt." *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1535, 16 L. Ed. 622 (1966), citing *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911). *See Hardin* v. *Summitt, supra,* at 581.

In civil contempt, "the act of disobedience consist[s] solely 'refusing to do what had been ordered, . . . not 'in doing what had been prohibited'." *Shillitani* v. *United States, supra,* 86 S. Ct. at 1534. When the contemnor carries "the keys of his prison in his own pocket," the action "is essentially a civil remedy designed for the benefit of other parties and . . . to secure compliance with judicial decrees." *Id.*

The action is civil contempt where "the primary purpose is not to punish for an offense but to compel obedience to and respect for an order of court." *Young* v. *Knight,* Ky., 329 S. W. 2d 195, 200 (1959), cited approvingly in *Hardin* v. *Summitt,* Ky., 627 S.W. 2d 580, 582 (1982).

A criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment of deterrence. *Shillitani, supra,* 86 S. Ct. at 1535 n.5.

CRIMINAL CONTEMPT

"[I]t is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & R. Co.,* 221 U. S. 418, 444, 31 S. Ct. 492, 499, 55 L. Ed. 797 (1911).

CIVIL CONTEMPT

"The petitioner in a proceeding in civil contempt bears the burden of proving that the respondent violated some court order, especially when the respondent denies the material allegations in the pleading." *Louisiana Ed. Ass'n* v. *Richland Parish Sch. Bd.,* 421 F. Supp. 973, 976 (W.D. La. 1976, *aff'd* 585 F. 2d 518 (5th Cir. 1978)[1]

"The 'order to show cause' is a widely used method of instituting a civil contempt proceeding, but it merely is a method of serving notice on the party allegedly in noncompliance." *Id.* at 976. "It [the show cause order] does not shift the burden of proof from the petitioner to the respondent." *Id.* "The burden that remains with the petitioner to the respondent." *Id.* "The burden that remains with the petitioner is to show the violation by clear and convincing evidence will not suffice." *Id.,* citing, *inter alia, Stringfellow* v. *Haines,* 309 F. 2d 910, 912 (2nd Cir. 1962).

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[1]Since in Kentucky the law of contempt of court, whether civil or criminal, has not been extensively treated in case law or legislation, counsel for Mr. Radigan has often had to utilize decisions from other jurisdictions to support the legal validity of his contentions.

"As a matter of legal theory, the burden of proving noncompliance by clear and convincing evidence stems from a presumption of sorts that a party will comply with court decrees." *Louisiana Ed. Ass'n* v. *Richland Parish Sch. Bd.*, 421 F. Supp. 973, 976 (W.D. La. 1976). "In civil contempt, the presumption in turn derives from the equitable maxim, *Equity regards as done that which ought to be done.*" *Id.*

"Based on policy and principle, then, in a civil contempt proceeding the petitioner first must show, by clear and convincing evidence, a violation of a valid court order." *Louisiana Ed. Ass'n* v. *Richland Parish Sch. Bd.*, 421 F. Supp. 973, 977 (W.D. La. 1976).

"The established rule in federal courts is that the burden [of proof] rests on the plaintiff to show by clear and convincing evidence that the defendants have violated a direct order of the court." *Fujiwara* v. *Clark*, 477 F. Supp. 809, 816 (D. Hawaii 1979). "All reasonable doubts must be resolved in favor of the defendant." *Id., see, e.g., Hanley* v. *Pacific Livestock Co.*, 234 F. 2d 522 (9th Cir. 1916); *N.L.R.B.* v. *Alamo Exp. Co.*, 234 F. 2d 522 (5th Cir. 1968); *Hart, Shaffner & Marx* v. *Alexander's Department Stores, Inc*, 341 F. 2d 101 (2nd Cir. 1965).

In the Opinion and Order of September 25, 1986, this Court stated that "Mr. Radigan gave no adequate response to the Order of this Court to show cause." (Opinion & Order (9-25-86), p. 3).

Obviously, this Court used the mere issuance of a "show cause" order, one promulgated in advance of any conduct which could be deemed a violation of any order of this court, to denigrate Mr. Radigan's presumptions of either "innocence" or "compliance" and to shift the burden of proof from this Court or its representative to Mr. Radigan. Such an approach, even by the highest court of a state, is violative of the United States Constitution.

A review of the entire opinion and order under scrutiny reveals that this Court at no time enunciated a standard of proof, such as "proof beyond a reasonable doubt" or "clear and convincing evidence," by which Mr. Radigan's conduct was found to be contumacious. Instead, the phrases employed to indicate the standard of proof employed in this decision are "no acceptable excuse", "no adequate response", and "reason for non-compliance". (Opinion and Order (9-25-86)).

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication" *Addington* v. *Texas,* 441 U. S. 418, 99 S. Ct. 1804. 1808, 60 L. Ed. 2d 323 (1979), citing *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 1076, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas, supra,* 99 S. Ct. at 1808. "In cases involving individual rights whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty'." *Id.,* 99 S. Ct. at 1809.

By depriving Mr. Radigan of these various federal constitutional protections, this Court effectively skewed the fact-finding process and undermined the correctness of its legal and factual determination.

In the final analysis, this Court's failure to observe minimal presumptions of law as well as standards and burdens of proof in adjudicating Mr. Radigan in contempt of court denied him federal due process and rendered this Court's finding of contempt constitutionally infirm. Ac-

cordingly, this Court should reconsider and vacate its Opinion and Order of September 25, 1986.

II.

This Court Erred to Mr. Radigan's Substantial Prejudice and Denied Mr. Radigan His Right to Due Process of Law by Failing to Provide Clear and Certain Notice That Mr. Radigan Was Facing Criminal Contempt Charges.

Speaking within the context of a contempt proceeding, the Supreme Court in *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 507-08, 92 L. Ed. 682 (1948), held that due process of law requires clear and certain notice of the charge:

> A person's right to *reasonable notice of a charge against him,* and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . (emphasis added).

Only a show cause order issued by the court is able to provide reasonable notice of the charge necessary for due process. "Reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed is basic to our system of jurisprudence." *Groppi* v. *Leslie,* 404 U. S. 496, 92 S. Ct. 582, 586, 30 L. Ed. 2d 632 (1972).

The show cause order which lead to the contempt finding in the above-captioned case was issued by this Court on August 30, 1985, in the above-captioned case. That Order stated:

> Appellant's motion for an extension of time, to and including June 12, 1986, in which to file his brief and to perfect the appeal in the above-styled action is granted. If appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's coun-

> sel, Honorable J. Vincent Aprile II, and Honorable William M. Radigan, shall appear before this court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this court or sanctioned for failure to timely complete the brief.

It is submitted that this order only gave notice of a possible *civil* contempt action.

The action is civil contempt where "the primary purpose is not to punish for an offense but to compel obedience to and respect for an order of court." *Young* v. *Knight,* Ky., 329 S. W. 2d 195, 200 (1959), cited approvingly in *Hardin* v. *Summitt,* Ky., 627 S. W. 2d 580, 582 (1982).

"Civil contempts" are "those which consist in the failure of one to do something under order of court for the benefit of a party litigant." *Gordon* v. *Commonwealth,* 141 Ky. 461, 133 S. W. 206, 208 (1911). "Civil contempts are those quasi contempts which consist in failing to do something which the contravenor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court." *Adam* v. *Gardner,* 176 Ky. 252, 195 S. W. 412, 414 (1917); *Tabor* v. *Commonwealth ex rel. Peterson,* 303 Ky. 810, 199 S. W. 2d 613, 614 (1947); *Jones* v. *Commonwealth,* 308 Ky. 233, 213 S. W. 2d 983 (1948).

As the Supreme Court of Florida in *Pugliese,* Fla., 347 So. 2d 422, 424 (1977), explained:

> If the purpose of the proceedings is to coerce action . . . by a party, the order of contempt is characterized as civil. . . . Such orders . . . classifically provide for termination of the contemnor's sentence upon purging himself of the contempt.

The obvious purpose and intent of this Court's order of August 20, 1985, was to insure that a brief was promptly filed in the *Moore* case. However, it is clear from this

Court's Opinion and Order of September 25, 1986, that Mr. Radigan was found guilty of *criminal* contempt. As this Court characterized it, the finding of contempt was a "conviction." (Opinion and Order (9-25-86), pp. 5-6).

"[A] criminal contempt proceeding is maintained solely and simply to vindicate the authority of the court or to punish otherwise for conduct offensive to the public in violation of an order of the court." *Pugliese, supra,* at 1144.

Without doubt, the nature of a criminal contempt proceeding is entirely different than civil contempt. No longer is there an attempt to compel action by the person. Rather, the individual is being punished for past offensive conduct. The only means for this Court to alter the civil contempt action to criminal contempt was for a new show cause order to be issued specifying the possible actions for which Radigan was to be punished.

There is no question that the failure of this Court to give Mr. Radigan notice of the type of contempt he was facing constitutes a violation of due process of law. As the Supreme Court stated in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 31 S. Ct. 492, 500, 55 L. Ed. 797 (1911):

> [E]very citizen . . . by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it was sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, *but to know that it is a charge, and not a suit* (emphasis added).

It is a fundamental precept that a civil contempt proceeding cannot be changed to criminal contempt without notice. In *Gompers,* the Supreme Court examined a situation

where a company had filed a show cause motion against the leaders of a union for violating a previously issued injunction. *Id.*, 31 S. Ct. at 496. Following a show cause hearing, the judge imposed sentences of imprisonment on each defendant. *Id.*, 31 S. Ct. at 497-98. The Supreme Court, in determining that a criminal contempt punishment had been imposed in a case involving civil contempt, reversed the judgment and commented:

> There was therefore a departure—a variance—between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief in the equity cause, the court imposed a punative sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A vs. B, for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months.

Similarly, Mr. Radigan should not have been punished for criminal contempt where the proceedings were for civil contempt.

From the Opinion and Order of September 25, 1986, it is apparent that this Court was concerned about the fact that Mr. Radigan filed another extension motion on the day the brief was scheduled to be filed. In the paragraph detailing the reasons for the contempt citation, this Court stated:

> Although counsel were fully aware that they would be unable to comply with his Court's Order of August 30, 1985 and timely file appellant's brief, they waited until the last day of the ten-month extension period to request another extension. Counsel were granted a realistic deadline for filing appellant's brief. We cannot condone the practice prevalent in criminal cases of routinely seeking an additional extension of time on

> the last day of the extension period rather than filing the brief. When counsel is granted an lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief. (Opinion and Order (9-25-86), p. 4).

Obviously, a portion of the contempt holding was premised on Mr. Radigan not immediately filing an additional extension motion.

However, as noted in the show cause order of August 30, 1985, Mr. Radigan was informed that contempt was possible only if the brief was not timely filed. There was not an iota of notice that he could be held in contempt for not immediately filing an extension motion. Such "a conviction upon a charge not made" is a denial of "constitutional due process." *Eaton* v. *Tulsa*, 415 U. S. 697, 94 S. Ct. 1228, 1229, 39 L. Ed. 2d 693 (1974).

As the prior discussion reveals, the notice provided by the August 30, 1985, order was, at best, vague and ambiguous. Such vagueness, however, is fatal to the ultimate finding that Mr. Radigan was in contempt of this Court.

"It is well established that before one may be punished for contempt for violating a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed." *United States* v. *Joyce*, 498 F. 2d 592, 596 (7th Cir. 1974). "Failure to take action is clearly, specifically, and unequivocally commanded by that order." *Id.* "Stated another way, it appears to be settled law that contempt will not lie for violation of an order of the court unless the order is clear and decisive and contains no doubt about that it requires to be done." *Id.*

"The judicial contempt power is a potent weapon." *Internat'l Long. Assn.* v. *Philadelphia Mar. T. A.*, 389 U. S. 64, 88 S. Ct. 201, 208, 19 L. Ed. 2d 236 (1967). "When it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.*, 88 S. Ct. 201, 208, 19 L. Ed. 2d 236 (1967). "When it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.*, 88 S. Ct. at 208. The United States Supreme Court differentiated between "a violation of a court order by one who full understands its meaning but chooses to ignore its mandate" and "acts alleged to violate a decree that can only be described as unintelligible." *Id.*

"The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Id.*, 88 S. Ct. at 208.

"[T]he general rule is that before a person may be held in contempt for violation a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather that implied." *Wood* v. *Goodson*, Ark., 485 S. W. 2d 213, 217 (1972).

"It is an accepted rule of law that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him." *Ex Parte Slavin*, Tex., 412 S. W. 2d 43, 44 (1967), and the cases cited therein.

"[A]n order, to serve as a basis for a contempt proceeding, must . . . have been so definite and certain in terms as to be readily understood" and "failure" to meet this test "renders the order void and unenforceable." *Hargis* v. *Fleck*, Iowa, 157 N. W. 2d 103, 109 (1968).

Inasmuch as this Court failed to provide Mr. Radigan with constitutionally acceptable notice, the Opinion and Order of September 25, 1986, must be vacated.

III.

This Court Erred to Mr. Radigan's Substantial Prejudice and Denied Mr. Radigan Procedural Due Process by Finding Him Guilty of Criminal Contempt Without Affording Him an Opportunity to Present or Cross-Examine Witnesses and by Acting in Disregard of His Fifth Amendment Privilege Against Self-Incrimination.

In *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 507-08, 92 L. Ed. 2d 682 (1948), the Supreme Court unequivocally explained the procedural due process rights which attach to a contempt proceeding:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, *a right to examine the witnesses against him, to offer testimony,* and to be represented by counsel. (emphasis added).

The only exception to this rule is where the act of misconduct occurs "in open court, in the presence of the judge." *Id.*, 68 S. Ct. at 509. *Accord: Taylor* v. *Hayes*, 413 U. S. 488, 94 S. Ct. 2697, 2702-2703, 41 L. Ed. 2d 897 (1974). Additionally, it has been long recognized that the Fifth Amendment privilege against self-incrimination applies to contempt hearings. *Gompers* v. *Buck's Stove & Range Company*, 221 U. S. 418, 31 S. Ct. 492, 500, L. Ed. (1911).

The show cause hearing conducted by this Court on June 24, 1986, failed to comply with these minimal due process standards in the following manner:

(1) Rather than acting under the presumption that Mr. Radigan had complied with the order of June 24, 1986, (see

Argument I, *supra*), this Court acted on the presumption that Mr. Radigan was in contempt. The burden of proof was shifted to Mr. Radigan to *disprove* the contempt:

(2) Even though this Court made three paragraphs of "findings of facts" in the Opinion and Order of September 25, 1986, there were no witnesses presented on June 24, 1986, for Mr. Radigan to cross-examine;

(3) Without any notice as to the criminal nature of the June 24th hearing (see Argument II, *supra*), Mr. Radigan was not prepared to offer witnesses in his own behalf;

(4) Without any notice as to the criminal nature of the June 24th hearing, Mr. Radigan was not alerted to the fact that his statement to this Court could be used against him. Even a cursory examination of the Opinion and Order of September 25, 1986, reveals that this Court's used Mr. Radigan's explanation as the basis for finding him in contempt of court.

In no stretch of the imagination did the proceedings of June 24, 1986, comply with the mandate of *Oliver*. Accordingly, this Court must vacate the Opinion and Order of September 25, 1986.

IV.

This Court Erred to Mr. Radigan's Substantial Prejudice and Denied Him Federal Due Process by Finding Him in Contempt of Court Where There Was No Competent, Probative Evidence to Support a Finding of Criminal Contempt.

"An essential element of the crime of criminal contempt is that the defendant acted culpably, in 'wilful disregard or disobedience of the authority or orders of the court.' " *People* v. *Kurz, Mich.*, 192 N. W. 2d 594, 599 (1971), citing, *inter alia, Panico* v. *United States*, 375 U. S. 29, 84 S. Ct. 19, 11 L. Ed. 2d 1 (1963) (remanding a conviction of criminal

contempt for a determination of whether the defendant was suffering from a mental disease which would have rendered him incapable of forming the requisite criminal intent for contempt).

The United States Supreme Court has recognized that "criminal contempt is a crime in every fundamental respect." *Bloom* v. *State of Illinois,* 391 U. S. 194, 88 S. Ct. 1477, 1482, 20 L. Ed. 2d 522 (1968). "[C]onvictions for criminal convictions, for their impact on the individual defendant is the same." *Id.,* 88 S. Ct. at 1482.

This Court made *no finding* that the evidence of record established, beyond a reasonable doubt, that Mr. Radigan "wilfully disregarded or disobeyed" this Court's order to complete the appellant's brief on or before June 12, 1986.

No adequate response," "no acceptable excuse," and no "reason for non-compliance" by Mr. Radigan at the show cause hearing do not translate into "wilfull disregard or disobediance" of this Court's order, particularly where Mr. Radigan filed a timely notice for an additional extension.

Mr. Radigan's "behavior may have been, to some degree, irritating to" this Court," but "his conduct" did not rise "to the level of wilful obstruction of the orderly administration of justice or flagrant disrespect for the court so as to sustain a conviction for criminal contempt." *Matter of Schwartz,* D.C., 391 A. 2d 278, 282 (1978).

By its Opinion and Order in the instant case, this Court implies that defense counsel must abandon his ethical and professional obligations to his clients and comply at any cost with the directive of an appellate court to file the appellant's brief.

"Lawyers of experience, who practice what we boast to be a learned profession, owe a duty both to their clients and to the court, and, perhaps even to other members of their profession, who appear as opposing counsel, to prepare cases properly, to give the issues full consideration before

preparing pleadings, and, in general, to exercise diligence in the practice of their profession." *Lamar* v. *American Finance System of Fulton City Inc.*, 577 F. 2d 953, 955 (5th Cir. 1978), citing ABA Code of Professional Responsibility DR 6-101.

"It is the duty of an attorney to research the law and to present the court with citations to controlling legal authority." *Vargas* v. *McNamara*, 608 F. 2d 15, 19 (1st Cir. 1979), citing ABA Code of Professional Responsibility, Canon 7, EC 7-23. "No court, no matter how capable and knowledgeable, can possibly keep in the front of its mind every precedent and statute in the myriad specialized areas of the law." *Id.*

"On appeal [the defense, counsel's] function is to point to trial errors, if such there be, and expound the applicable rules of law." *Johnson* v. *United States*, 360 F. 2d 844, 846 (D.C. Cir. 1966). "In short he is to 'put his client's best foot forward." *Id.* The court-appointed counsel "performs an important function by making sure that the reviewing court understands all the salient facts and the relevant legal authorities before reaching a final decision." *Id.* Indeed, "an advocate performs a most important function when by his analysis he presents the critical issues and brings to the Court all the facts and law." *Id.*

Viewed from this perspective, it is undeniable that an appellate brief for a convicted defendant can never be regarded as a mere perfunctory obligation, capable of summary discharge. "The due process right to assistance of counsel requires more than a *pro forma* representation." *Shipman* v. *Gladden*, Or., 453, P. 2d 921, 924 (1969).

This Court's factual finding that "[u]pon accepting the responsibility of this appeal, Mr. Radigan agreed to devote the necessary time and energy to this case and as a private attorney who is able to control his caseload, he could not offer adequate reason for non-compliance with this Court's

Order" ignores the reality of the situation. (Opinion and Order (9-25-86), p. 4). As explained at the hearing on June 24, 1986, Mr. Radigan has essentially volunteered to assist an overworked and understaffed Public Advocacy office in a death penalty appeal. More importantly, however, is the fact that Mr. Radigan will not be compensated at a rate that is even close to an appropriate amount for the time required to be devoted to such a case of this length and magnitude.

In any event, the record at bar contains no relevant evidence as to the crucial element of criminal contempt, that is, "a wilfull disregard or disobedience" of this Court's order.

Under federal constitutional law "a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Harris* v. *United States*, 404 U. S. 1232, 92 S. Ct. 10, 12, 30 L. Ed. 2d 25 (1971); *see Vachon* v. *New Hamshire*, 414 U. S. 478, 94 S. Ct. 664, 665, 38 L. Ed. 2d 666 (1974). Each essential ingredient of the crime charged must be supported by some evidence in the record, *Johnson* v. *Florida*, 39 U. S. 596, 88 S. Ct. 1713, 1715, 20 L. Ed. 2d 838 (1968). *See* also *Thompson* v. *City of Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960).

Assuming *arguendo* this Court concludes there was some relevant evidence on this element of criminal contempt, the evidence was still constitutionally deficient to sustain the verdict. Utilizing the federal constitutional standard, "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favor-

able to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, 99 S. Ct. at 2789.

On the basis of the evidence of record, no rational trier of fact could find beyond a reasonable doubt that Mr. Radigan's conduct in the instant case was wilful disregard or disobedience of this Court's order.

Accordingly, this Court should reconsider its opinion and order in the case at bar and vacate that decision.

V.

The Fear to Three Decision of This Court, Finding William M. Radigan in Contempt of Court, Violates Mr. Radigan's Due Process Right as to a Finding of Guilt Beyond a Reasonable Doubt.

In the Opinion and Order of September 25, 1986, four justices of this Court concurred in the determination that Mr. Radigan was in contempt of court—Justices Stephens, Leibson, Stephenson, and Wintersheimer. Justice Vance opined that sanctions were warranted but without a finding of contempt, while Justices Gant and White dissented.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the corrections of factual conclusions for a particular type of adjudication.' " *Addington* v. *Texas,* 441 U. S. 418, 99 S. Ct. 1804, 1807, 60 L. Ed. 2d 323 (1979), citing *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 1076, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring). "The standard serves to allocate the risk of error between the litigants and to indicate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas, supra,* 99 S. Ct. at 1808. "In cases

involving individual rights where criminal or civil '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Id.*, 99 S. Ct. at 1809.

"[I]t is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, *he must be proved to be guilty beyond a reasonable doubt,* and cannot be compelled to testify against himself." *Gompers* v. *Bucks Store & R. Co.*, 221 U. S. 418, 444, 31 S. Ct. 492, 499, 55 L. Ed. 797 (1911). (emphasis added).

While it is true that unanimous verdicts are not constitutionally required in state criminal trials, a 4 to 3 verdict does not satisfy the requirement of a finding of guilt beyond a reasonable doubt. In *Johnson* v. *Louisiana*, 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), and *Apodaca* v. *Oregon*, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), the Supreme Court concluded that jury verdicts of ten to two and eleven to one did not violate the due process requirement of proof beyond a reasonable doubt. However, the Court emphasized that the decision was premised on the fact that "a substantial majority" or "a heavy majority" of the jury agreed on the verdict. *Johnson, supra*, 92 S. Ct. at 1625.

In his concurring opinion in *Johnson*, Justice Blackmun expressed the view that verdicts of less than a substantial majority would not withstand scrutiny:

> I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. *Id.*, 92 S. Ct. at 1635.

Interestingly enough, the 4 to 3 decision (57%) in the case at bar would not be sufficient to return a verdict in Kentucky in even a civil case. Section 248 of the Kentucky Constitution requires that a 3/4 majority of the jury is required in civil actions. *See* also: KRS 29A.280.

Accordingly, the Opinion and Order of September 25, 1986, finding Mr. Radigan in contempt of court must be vacated.

VIII.

The Court's Decision to Hold Mr. Radigan in Contempt of Court, Even After He Had by Timely Motion Requested an Extension to File the Brief, Violated the Rule of the Least Judicial Power and Denied Mr. Radigan Federal Due Process of Law.

"A court must exercise '[t]he least possible power adequate to the end proposed.' " *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1536, 16 L. Ed. 2d 622 (1966).

"This doctrine . . . requires that the trial judge first consider the feasibility of coercing testimony [, for example,] through the imposition of civil contempt." *Id.,* 86 S. Ct. at 1536 n. 9. "The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Id.*

The doctrine of the exercise of the least judicial power to the end proposed has equal application to original actions, such as contempt proceedings, by an appellate court.

Recently, in *Matter of Goodwin,* S.C., 305 S. E. 2d 578, 579 (1983), the South Carolina Supreme Court addressed the question of "whether the trial judge erred in ordering [two public defender attorneys] to continue to represent [their client] and in holding them in contempt for refusing." The two public defenders wanted to withdraw because they believed the client intended to commit perjury at his own trial. *Id.*

The *Goodwin* court "sympathize[d] with the [two public defenders'] position, and [was] convinced they were sincere in their representations to the court." *Id.* at 580. However, the *Goodwin* court observed:

> Nevertheless, Circuit Court Rule 7 provides that an attorney may not withdraw except by order of the circuit judge. In violation of this rule and the judge's specific order directing them to proceed, the appellants refused to continue with the trial. We agree with the trial judge appellants were in contempt of court; we further agree, this being an issue of novel impression, no sanctions were warranted. *Id.*

The decision of the South Carolina Supreme Court to impose no sanctions in this "issue of novel impression" reflects a reliance on the doctrine of the imposition of the least judicial power.

In the case at bar, this Court ordered Mr. Radigan to appear at a hearing "to show cause why [he] should not be held in contempt of this Court or sanctioned for failure to timely complete the brief" (Order, 8-30-83). Mr. Radigan's representations to this Court both in the additional extension motion and at the hearing on June 24th indicated his good faith position. The finding of criminal contempt and the imposition of a sanction, violated federal due process of law. Accordingly, this Court should reconsider and vacate its Opinion and Order of September 25, 1986.

VII.

The Action of This Court in Holding Mr. Radigan in Contempt of Court Casts a Chilling Effect on Not Only Mr. Radigan's Appellate Representation of Other Clients, But Also the Representation of Other Appellants by All Members of the Bar.

In holding Mr. Radigan in contempt of court for failure to file the *Moore* brief on June 12, 1986, this Court sent a very definite message to the members of the Bar—even though this Court will not dismiss the appeal, if the attor-

neys do not comply with the orders of this Court to file the brief on a certain date, then the attorneys will be penalized by contempt proceedings. Such a result is contrary to the purpose of a contempt action and casts a chilling effect on effective representation by appellate attorneys.

"The power to punish contemptuous conduct is essential to the preservation of the dignity and authority of [this nation's] courts." *In Re Masinter,* La., 355 So. 2d 1288, 1290 (1978). "This power, however, must be used with great care so as not to obstruct the advancement of causes before this court." *Id.* at 1291.

Appellate courts should "hesitate to take disciplinary actions" unless obviously warranted because the courts must remain "sensitive to even the slightest possibility of casting an inhibitory shadow upon the ardor of those who practice before: them." *In Re Bithoney,* 486 F. 2d 319, 323 (1st Cir. 1973).

Courts should use the ability to punish through contempt sparingly. "This is particularly true in contempt cases against lawyers, where there must be limited interference with their right to properly represent their clients." *Matter of Schwartz,* D.C., 391 A. 2d 278, 281 (1978).

"In contempt cases against lawyers the evidence must be carefully scrutinized in order to insure that there is no undue interference with the attorney-client relationship." *In Re Marshall,* 423 F. 2d 1130 (5th Cir. 1970), citing *United States* v. *Schiffer,* 351 F. 2d 91, 94 (6th Cir. 1965).

The Court of Appeals of Michigan in *People* v. *Kurz,* 35 Mich. App. 643, 192 N. W. 2d 594, 498 (1972), warned about the adverse side-effects of a finding of contempt against an attorney:

> Unless a lawyer's conduct manifestly trangresses that which is permissible it may not be the subject of charges of contempt. Any other rule would have a chilling effect on the constitutional right to effective

> representation and advocacy. In any case of doubt the doubt should be resolved in the client's favor so that there will be adequate breathing room for courageous, vigorous, zealous advocacy.

The facts of the case at bar reflect the possibility of such a chilling effect on zealous advocacy. The Opinion and Order of September 25, 1986, places Mr. Radigan in the midst of an ethical dilemma—either work on the *Moore* brief and complete it in time, or else you will be fined. Of course, this would effectively eliminate any time that Mr. Radigan could devote to his other clients, both private and public.[2] Those existing clients would therefore be pen-

In *Fisher* v. *Pace,* 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949), the United States Supreme Court held that it is the duty of counsel to abide by the court's rulings, even if erroneous, since any other procedure "would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice." However, in *In re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 424 (1962), the United States Supreme Court held that while it is necessary that a judge have the power to protect himself from actual obstruction in the courtroom, "it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases." "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." *Id. See Muskus* v. *State,* Md., 286 A. 2d 783 (1972).

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[2]As Mr. Radigan has noted in his extension motions, he still does public defender work at both the trial and appellate level.

Since this Court's action in holding Mr. Radigan in contempt of court places a chilling effect on attorneys in this Commonwealth, this Court should vacate the Opinion and Order of September 25, 1986.

VIII.

This Court Erred to Mr. Radigan's Substantial Prejudice and Denied Mr. Radigan Due Process of Law by Utilizing a Contempt Finding Nearly Three Years Old as the Basis for Ordering Payment of the $500 Fine in the Case at Bar.

In the Opinion and Order in *In Re Radigan,* Ky., 660 S. W. 2d 673 (1983), this Court imposed a fine of $100 on Mr. Radigan due to his failure to timely file a brief. However, "[i]n consideration of this being his first conviction, payment of the fine is suspended subject to further conduct." Even though specifically addressed in his Motion for Reconsideration, there was no mention of either the length of the suspension, or the terms and conditions of the suspension.

In the Opinion and Order of September 25, 1986, this Court utilized this prior contempt holding as the basis for requiring Mr. Radigan to pay the $500 fine:

> On December 22, 1983, this Court entered an Opinion and Order styled In Re Radigan, Ky., 660 S. W. 2d 673 (1983) adjudging William Radigan to be in contempt of this Court and fining Mr. Radigan $100 for his failure to timely file the brief for appellant, Joseph Herald, and for his failure to timely notify this Court of his alleged inability to comply with court ordered briefing. As this present conviction is Mr. Radigan's second conviction for contempt of this Court, his $500 fine is payable to the Clerk of the Supreme Court, (Opinion and Order (8-25-86), p. 6).

In *Bloom* v. *Illinois,* 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the Supreme Court noted the similarity between contempt convictions and criminal convictions:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:
>
> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States,* 233 U. S. 604, 610, 34 S. Ct. 693, 695, 58 L. Ed. 1115 (1914). *Id.,* 88 S. Ct. at 1481.

As such, limitations placed on judges in sentencing criminals also apply to sentences imposed in contempt cases.

"The court should specify at the time of sentencing the length of any term during which the court will retain power to revoke the sentence for violation of specified conditions." III ABA Standards for Criminal Justice (2nd Ed. 1980), *Sentencing Alternatives and Procedures,* Standard 18-2.3 (b)(i). "All conditions of probation should be prescribed by the sentencing court and presented to the probationer in writing." *Id.,* Standard 18-2.3(c)(i). "Where fundamental rights are involved, special care should be taken to avoid overbroad restrictions or restraints which are so vague or ambiguous as to fail to give real guidance." *Id.,* Standard 18-2.3(e).

Additionally, it should be noted that, if this were a criminal case under the Penal Code, the sentencing judge would have to provide "a written statement explicitly setting forth the conditions" of the suspended sentence. KRS 533.030(4). The period of the suspension would likewise

be limited to a period of five (5) years for a felony or *two (2) years for a misdemeanor.* KRS 533.020(3).

If these limitations are applicable to criminal cases, then certainly they apply to contempt cases. Yet, in the case at bar, Mr. Radigan faced an indefinite suspension without any specified conditions. This situation recalls the warning of the Supreme Court in *Bloom* v. *Illinois, supra:*

> The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an "arbitrary" power which is "liable to abuse." Ex parte Terry, 128 U. S. 289, 313, 9 S. Ct. 77, 82, 32 L. Ed. 405 (1888). "[I]ts exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States,* 267 U. S. 517, 539, 45 S. Ct. 390, 396, 69 L. Ed. 767 (1925). *Id.,* 88 S. Ct. at 1482.

The right of a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri,* 420 U. S. 162, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975); *Estelle* v. *Williams,* 425 U. S. 501, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126 (1976). "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida,* 430 U. S. 349, 97 S. Ct. 1197, 1205, 51 L. Ed. 2d 393 (1977).

For the reasons delineated, Mr. Radigan submits that this Court must modify the Opinion and Order of September 25, 1986, by not applying his prior contempt holding to this case, and suspend the imposition of the $500 fine.

CONCLUSION

For the reasons delineated above, Mr. Radigan requests this Court to vacate the Opinion and Order of September 25, 1986, in the above-captioned case.

Respectfully submitted,

(s) William M. Radigan
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Louisville, Kentucky 40202

(s) Frank E. Haddad Jr. by WMR
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Louisville, Kentucky 40202

NOTICE

Notice is hereby given that the foregoing Motion will be filed with the Clerk of the Supreme Court of Kentucky on this 6th day of October, 1986, to be immediately considered by the Court.

(s) William M. Radigan

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion was hand-delivered to the Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, on this 6th day of October, 1986.

(s) William M. Radigan

ORDER

Appellee's motion to continue the show cause hearing scheduled in the above-styled action for October 7, 1986 at 11:00 a.m. is granted and the show cause hearing is hereby rescheduled for October 28, 1986 at 11:00 a.m.

All sitting. All concur.

ENTERED October 7, 1986.

(s) Robert F. Stephens
Chief Justice

STATEMENT AND ORDER BY JUSTICE CHARLES M. LEIBSON RECUSING HIMSELF FROM ALL SUBSEQUENT PROCEEDINGS IN THIS ACTION

On October 6, 1986, a motion demanding disqualification by the undersigned "from any and all proceedings in the above-captioned case and to vacate this Court's Opinion and Order of September 25, 1986 in the above-captioned case," was filed by attorneys J. Vincent Aprile, II and William M. Radigan, as counsel for appellant.

Three weeks earlier, September 16, 1986, our Court had conducted a hearing at which these two attorneys, Aprile and Radigan, appeared to answer to a show cause order inquiring why they should not be held in contempt of court for failing to comply with the orders of our Court regarding briefing in the above-styled action. The undersigned participated as a member of the Court in conducting that hearing, and also in the decision holding that Aprile and Radigan were in contempt of court which followed in the Order of Contempt dated September 25, 1986.

Neither of these attorneys brought to our attention at that time or any time before October 6, 1986, that the undersigned had testified as a witness *for the defense* two

years earlier at the trial of Brian Keith Moore, on October 29, 1984. Upon receipt of counsel's motion to disqualify, the undersigned located the Transcript of Evidence (which is checked out to the Department of Public Advocacy) and verified that he had testified at Brian Keith Moore's trial. My testimony was about a different case, proceedings involving Kenneth Wayne Blair. Blair's name was significant, but Moore's name meant nothing to me.

The Motion to Vacate claims that the undersigned should not have participated in the contempt proceedings against counsel because he "has been a *material* witness concerning the matter in controversy." To my knowledge, the only "matter in controversy" in the Moore case that we have considered thus far is counsels' failure to file a brief on behalf of their client.

No credible excuse has been offered by counsel for failing to bring to my attention, or to the Court's attention, that the undersigned had been called by counsel to testify at the trial of Brian Keith Moore until after the Order of Contempt was entered against them. At a hearing on a *second* show cause order on October 7, 1986, both attorneys offered an absurd explanation to the effect that they assumed that the undersigned needed no reminder, and that he was sitting as a judge in the contempt proceedings on September 16th, mindful that he had testified at Moore's trial, with no intention of participating thereafter in the decision of the matter being heard.

I have been wrongfully charged with knowingly participating in a case where I should have recused myself. I now recuse myself from further participation in this case solely because Brian Keith Moore, facing the death penalty, should not need to be concerned that his attorneys' offensive behavior might prejudice me against his case.

The facts in the Moore case have yet to come before our Court because it is still in the briefing stage. His name, by

itself, did nothing to trigger my memory. My role was incidental in the Moore case, and I had no reason to remember the connection between the Kenneth Wayne Blair case in which I presided as trial judge and Moore. On October 7, 1986, after the Motion to Disqualify, I obtained and reviewed that portion of the transcript of evidence from the Moore case containing my testimony, and also various papers pertaining to the plea of guilty proceedings involving Kenneth Wayne Blair. The proceedings against Blair for unrelated offenses was the subject matter of my testimony when called as a witness to testify in Moore's trial. At Moore's trial the undersigned testified from his records about the Kenneth Wayne Blair proceedings. This testimony had no direct bearing on the guilt or innocence of Brian Keith Moore. I now speculate that Blair was a witness against Moore and my testimony was offered to discredit Blair, and perhaps to discredit evidence Blair may have given against Moore. I have no personal knowledge as to whether Blair did in fact testify at Moore's trial.

I express no opinion on whether I would have participated in the contempt hearing against Aprile and Radigan had I been reminded that I had testified at Moore's trial. There are interesting legal questions about recusal in these circumstances which I will not address, to wit: (1) I was called to testify *for* Moore, not against him; (2) I was *not a material* witness at Moore's trial, if this means a witness to any *material* fact proving his guilt or innocence; and (3) the contempt proceedings were against Aprile and Radigan, and have no bearing on the outcome of Moore's case.

In *Commonwealth* v. *Carter,* Ky., 701 S. W. 2d 409 (1985), a published opinion of our Court, we held that counsel cannot assume that the Court is aware of a judge's prior participation in other proceedings against his client, and cannot complain of the Court's failure to recuse on this

basis when counsel has failed to bring such prior participation to the attention of the Court. Thus there is no reason under any circumstances for me to disqualify myself as regards my participation in this case before October 6, 1986, the date when Aprile and Radigan first called my participation to my attention. I recuse myself from this day forward from any further connection with any aspect of this case, for reasons stated above that relate to statements by Aprile and Radigan of a personally offensive nature.

ENTERED: October 10th, 1986. 3 P.M.

(s) Charles M. Leibson
Justice Charles M. Leibson

Attorneys for Appellant, Moore:

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Attornelys for Appellee, Comm. of Ky.:

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Attorney for Aprile:

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Attorney for Radigan:

FRANK E. HADDAD, JR.
529 Ky. Home Life Bldg.
Louisville, KY 40202

ORDER

The motion of appellant, Brian Keith Moore, by and with counsel to vacate this Court's Opinion and Order of September 25, 1986, is denied.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, J.J., sitting. All concur. Leibson, J., not sitting.

ENTERED: November 6, 1986.

(s) Robert F. Stephens
Chief Justice

ORDER

Appellant's motion for an extension of time is granted to the extent that attorneys for appellant, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan shall file their brief and perfect the appeal in the above-styled action on or before December 12, 1986. If the brief is not filed and the appeal is not perfected on or within this time, attorneys for appellant, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan, shall appear before this Court on January 13, 1987 at 2:00 p.m. to show cause why they should not be held in contempt of this Court or

have sanctions levied against them for failure to timely file their brief and perfect the appeal.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, J.J., sitting. All concur. Leibson, J., not sitting.

ENTERED: November 6, 1986.

(s) Robert F. Stephens
Chief Justice

ORDER DENYING MOTIONS TO RECONSIDER OPINION AND ORDER HOLDING WILLIAM M. RADIGAN AND J. VINCENT APRILE IN CONTEMPT

The motions to reconsider opinion and order, entered September 25, 1986, holding William M. Radigan and J. Vincent Aprile in contempt are denied.

Stephens, C.J., and Gant, Stephenson, and Wintersheimer, J.J., concur.

Leibson, J., not sitting.

ENTERED: November 26, 1986.

(s) Robert F. Stephens
Chief Justice

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT
Filed December 9, 1986

Comes now the appellant, Brian Keith Moore, by counsel, and, pursuant to CR 6.02 and CR 76.40(1), respectfully requests an extension of forty-five (45) days from Friday, December 12, 1986, to and including Monday, January 26, 1987, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 509.040), and one count of first degree robbery (KRS 515.020). For the murder offense, appellant was sentenced to death.

2. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by this Court.

3. During the past ninety (90) days, the undersigned counsel Radigan has been involved in numerous appellate and trial proceedings in both state and federal court, including the following: four (4) trials in the Jefferson District Court (September 29, October 2, October 29, and November 10, 1986); two (2) trials in the McCracken Circuit Court (November 6, December 3-4, 1986); two (2) hearings in the United States District Court for the Western District of Kentucky (November 3, November 18, 1986); one (1) brief in the Supreme Court of Kentucky (October 6, 1986); two (2) oral arguments (Court of Appeals of Kentucky [November 12, 1986] and United States Court of Appeals for the Sixth Circuit [December 5, 1986]). Furthermore, the undersigned counsel has been involved in a total of fourteen (14) depositions involving three (3) separate cases during the same period. Additionally, the undersigned counsel Radigan has been preparing for a trial in the United States District Court for the Western District of Kentucky which is scheduled to begin on December 9, 1986, as well as spending an extensive amount of time in preparation for a capital murder trial in the Jefferson Circuit Court.

4. During the forty-five (45) days since the show cause hearing held by this Court on October 27, 1986 in the above-captioned case, undersigned counsel Aprile has been required to devote some portion of his time to work in other cases. For example, undersigned counsel Aprile has been required to file pretrial motions and make an appearance (November 20, 1986) in Christian Circuit Court in Hop-

kinsville, Kentucky in a pending death penalty trial where undersigned counsel Aprile is counsel of record. During the same period, he filed a motion for discretionary review in this Court (November 5, 1986). Additionally, in that same period undersigned counsel Aprile in his role as General Counsel filed legal memoranda on behalf of the Department of Public Advocacy with the Equal Employment Opportunity Commission in Louisville, Kentucky (November 12, 1986). As DPA's General Counsel, he was also required in the last forty-five days to file pleadings on behalf of the agency in a death penalty case pending in Mercer Circuit Court (December 2, 1986). In that same period undersigned counsel Aprile has had to devote a portion of his time to a post-conviction action in a death penalty case in Eastern Kentucky which is scheduled for a hearing on December 22, 1986.

5. Nevertheless, during the last three months substantial progress has been made on the completion of appellant's brief. A considerable portion of the brief has been completed and typed. But a number of issues remain to be written and typed.

6. The undersigned counsel are endeavoring to complete the brief in the case at bar in less than the requested forty-five days, but believe that in any event six weeks will be the maximum amount of time needed. The forty-five day extension request is made with counsel's recognition that some time during the next six weeks has to be devoted to other pending cases.

7. This motion for an extension of forty-five days is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

8. Appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted an extension of forty-five (45) days to and including Monday, January 26, 1987, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Department of Public Advocacy

(s) William M. Radigan by LHM
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(s) J. Vincent Aprile II by LHM
J. Vincent Aprile II
Assistant Public Advocate
Department of Public Advocacy
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Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Notice is hereby given that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 9th day of December, 1986.

(s) J. Vincent Aprile II by LHM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed, postage prepaid, to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 9th day of December, 1986.

(s) J. Vincent Aprile II by LHM

ORDER

Appellant's motion for an extension of time, to and including January 26, 1987, in which to perfect the appeal and to file his brief in the above-styled action is granted.

This court hereby defers ruling on the November 6, 1986 order to show cause, pending counsel's compliance by filing the aforementioned brief.

Stephens, C.J., and Gant, Lambert, Stephenson, Vance and Wintersheimer, J.J. sitting.

All concur.

ENTERED: January 15, 1987.

(s) Robert F. Stephens
Chief Justice

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT

Filed January 26, 1986

85-SC-101-I

Comes now the appellant, Brian Keith Moore, by counsel, and, pursuant to CR 6.02 and CR 76.40(1), respectfully requests an extension of seven (7) days from Monday, January 26, 1987, to and including Monday, February 2, 1987, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 509.040), and one count of first degree robbery (KRS 515.020). For the murder offense, appellant was sentenced to death. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by this Court.

2. On January 15, 1987, this Court granted appellant's motion for an extension of time to and including January 26, 1987, in which to perfect the appeal and file the brief in this action.

3. As of the date of this motion, undersigned counsel Radigan has completed all of the assignments of error for which he is responsible. The arguments undersigned counsel Radigan has most recently completed are being keyboarded into the word processor at the Department of Public Advocacy at the time of this motion, January 27, 1987. Of course, the assignments of error being typed today will still have to be proofread and the errors corrected. Undersigned counsel Radigan will not be available to perform any additional work on appellant's brief during the requested seven-day extension period due to a medical problem. On Tuesday, January 28, 1987 undersigned counsel Radigan will have out-patient surgery at the hospital and will be unable to work during the recouperation period which will last through the following weekend. This surgery was originally scheduled for late December 1986, but undersigned counsel Radigan rescheduled it pending completion of his portion of the brief.

4. Undersigned counsel Aprile still has a number of assigned errors to finish drafting. All of Aprile's completed assignments of error have been keyboarded.

5. To allow sufficient time for the remaining tasks in the preparation of this brief to be completed—such as time for undersigned counsel Aprile to complete his remaining arguments, time for original keyboarding and corrections,

preparation of the appendix, finalizing the statement of points and authorities, and reproducing the brief in final form—undersigned counsel Aprile estimates that he will need the one (1) additional week he has requested. The undersigned counsel are mindful that in their last extension motion they stated that they were "endeavoring to complete the brief in the case at bar in less than the requested forty-five days, but believe that in any event six weeks will be the maximum amount of time needed." Unfortunately, that estimate has proven inaccurate.

6. For undersigned counsel Aprile, certain aspects of a pending case in which he is counsel have demanded unexpected portions of his time. For example, on Wednesday, January 21, 1987, undersigned counsel Aprile was required to travel to Christian Circuit Court in Hopkinsville, Kentucky to take the videotaped deposition of the woman who is named as the victim in the attempted murder charge in the upcoming death penalty trial of Mr. Aprile's client. Because that woman is departing Kentucky to live in Europe for a number of years, undersigned counsel Aprile had no choice but to participate in her deposition on the date in question. Due to the time constraints, undersigned counsel Aprile could not have sought a postponement of that deposition until a later date. Not only did the combination of the round trip by car from Louisville to Hopkinsville and the actual taking of the deposition require an entire workday, but considerable time had to be spent by undersigned counsel Aprile to prepare for this deposition. Similarly, during the last seven days, undersigned counsel Aprile had to meet with the family of his client who is facing the death penalty in Christian Circuit Court to discuss potential mitigation evidence. Since the client's father, mother, and two sisters all reside out-of-state, undersigned counsel Aprile had to utilize the available oppor-

tunity to meet with those four witnesses and could not ethically postpone that meeting.

7. The undersigned counsel are well aware that this Court normally does not want an extension motion filed on the final day of the granted briefing period. Under the circumstances of the appeal at bar, undersigned counsel Aprile felt that filing this extension request on the last day of the granted briefing period was appropriate. First, the undersigned counsel had on Tuesday, January 13, 1987, reported to this Court on the status of this brief. That hearing was less than two weeks ago. Second, a motion filed on the final date of the granted briefing period would allow the undersigned counsel both to make their best estimate of the amount of time needed to complete the brief and to provide this Court with the most accurate report of the present status of the brief. These are the only reasons why the extension motion was not file earlied, such as on Thursday, January 22, 1987. Undersigned counsel Aprile believes the facts and circumstances of this case justify the filing of this motion on the last day of the briefing period.

This motion for an extension of seven days is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

9. Appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted an extension of seven (7) days to and including Monday, February 2, 1987, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile II for
William M. Radigan
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Louisville, Kentucky 40202
(s) J. Vincent Aprile II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Notice is hereby given that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 27th day of January, 1987.

(s) J. Vincent Aprile II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed, postage prepaid, to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 27th day of January, 1987.

(s) J. Vincent Aprile II